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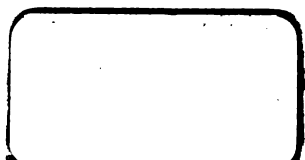
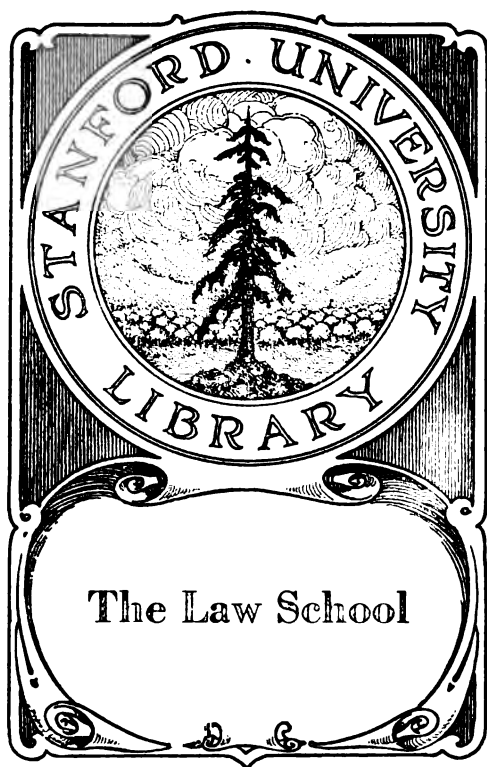
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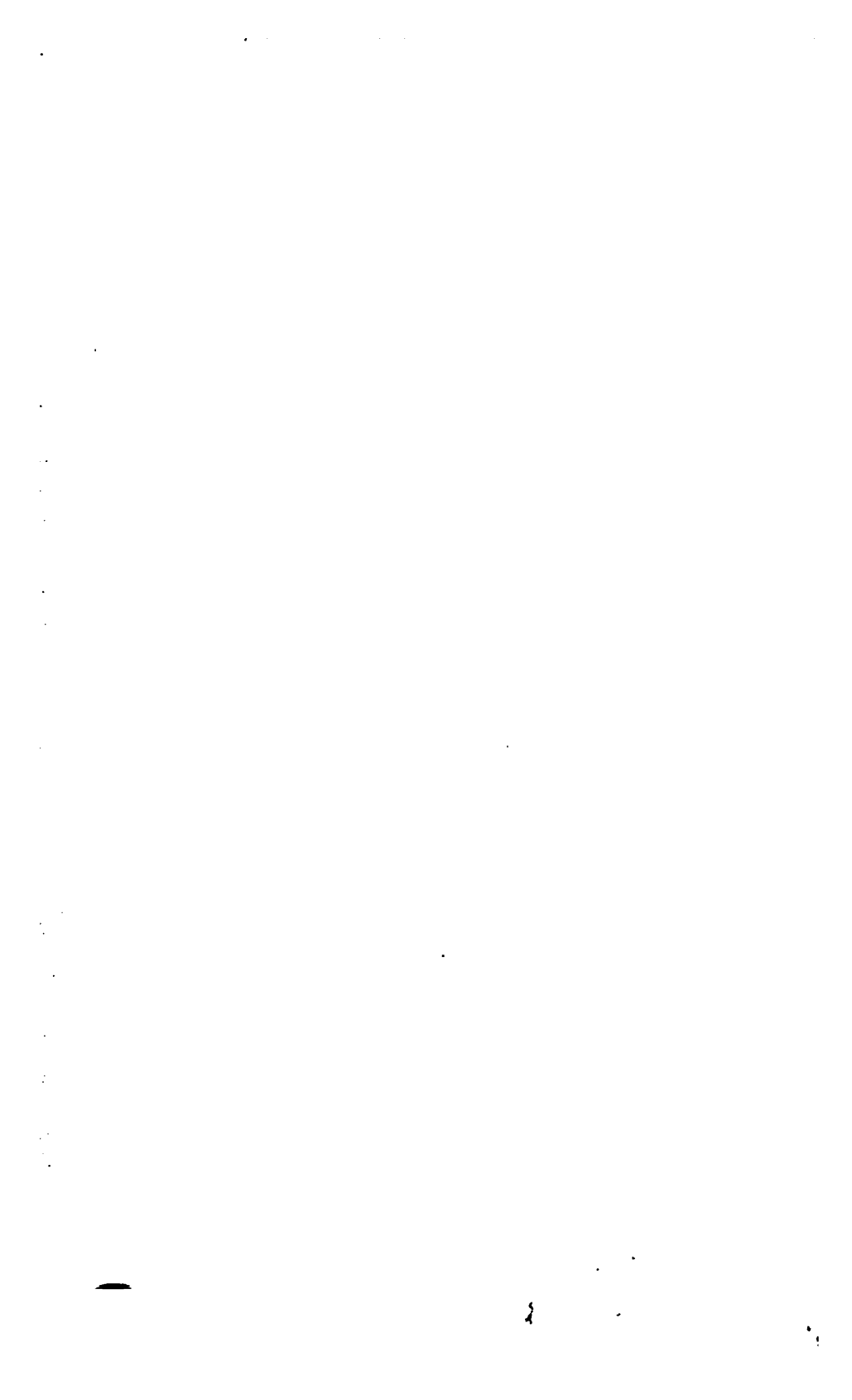
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California. Laws, Statutes &c

THE
CIVIL PRACTICE ACT
of H. H. Bancroft
STATE OF CALIFORNIA,

INCLUDING

AMENDMENTS OF 1868,

WITH

NOTES AND REFERENCES,

TO THE DECISIONS OF THE SUPREME COURT, GENERAL LAWS
GERMAIN TO THE PRACTICE ACT, AND STANDARD
FORMS APPLICABLE THERE TO ; AND

AN APPENDIX,

CONTAINING THE ACTS CONCERNING FORCIBLE ENTRIES AND UNLAWFUL DETAIN-
ERS, AND THE RULES OF THE SUPREME COURT, AND OF THE DISTRICT
COURTS OF THE CITY AND COUNTY OF SAN FRANCISCO.

EDITED BY
CHARLES H. PARKER, Esq.,
ATTORNEY AT LAW.

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on. The Act

SAN FRANCISCO
H. H. BANCROFT AND
1868.

C. H. P.

copy

Entered according to Act of Congress, in the year of our Lord 1932, by
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P R E F A C E .

In the preparation of the present edition of the Practice Act, the general plan adopted in Bancroft's Practice Act has been followed; but in the classification of the decisions under their appropriate sections and heads, it is believed that this edition will be found to have reached a greater degree of perfection. It has been deemed advisable by the editor of this edition to confine his annotations to the decisions of this State applicable to the Practice Act alone; and hence the decisions of other States relating to practice, and those of this State on Mines, Mortgages, Ejectment, and other subjects which appeared in the former work, together with the matter contained in the Appendix, have been omitted. This course has been rendered necessary to make room for the increased number of decisions bearing directly upon the subject of the present work. This edition has been carefully revised, and the annotations are brought down to, and include many of, the decisions rendered at the present term of the Supreme Court—the latter having been added while the work was passing through the press.

A large number of general laws germane to the Practice Act will be found distributed throughout the work, in connection with cognate subjects.

Errors, typographical and other, are to be found in all books. This will prove no exception. The Act itself, however, will be found correct.

C. H. P.

T H E

CALIFORNIA PRACTICE ACT.

AN ACT TO REGULATE PROCEEDINGS IN CIVIL CASES IN THE COURTS OF JUSTICE OF THIS STATE.

AS PASSED APRIL 29TH, 1851, AND AS SUBSEQUENTLY AMENDED BY VARIOUS ACTS OF THE LEGISLATURE UP TO AND INCLUDING THE YEAR 1867-8.

1. The common law.—The common law constitutes the basis of our jurisprudence, and rights and liabilities must be determined in accordance with its principles, except so far as they are modified by statute. *Van Maren v. Johnson*, 15 Cal. 308. The common law having been adopted as a rule of decision in this State, it is the duty of the Court to enforce it. *Johnson v. Fall*, 6 Cal. 361.

2. The phrase, "Proceeding according to the course of the common law," has been used merely from force of habit, or mainly for ornamental purposes; it leaves no definite impression on the understanding, it is simply equivalent to a knowing look or shake of the head. When first employed its use was harmless; but its continued use, where the modes of the common law have been superseded, is mischievous. *Hahn v. Kelley*, Oct. T. 1867.

3. Construction of the act.—In construing this act, it is proper to remember that the two leading ends contemplated by the system are simplicity and economy; and it would seem, therefore, to be a just conclusion, that the Court should exercise a liberal construction, and that the main intent and spirit of the act should be fairly carried out. *Adams v. Hackett*, 7 Cal. 201. We adopt the New York construction of the Code where the sections are alike. *Id.* 203. Our system of pleading is formed upon the model of the civil law, and one of its principal objects is to discourage protracted and vexatious litigation. It is the duty of the Courts to assist, as far as possible, in the accomplishment of this object, and it should not be frittered away by the application of rules which have no legitimate connection with the system. *Jones v. Steamship Cortes*, 17 Cal. 497.

4. It is prospective.—The Practice Act of April 29th, 1851, is prospective in its operation, and to give it a retrospect beyond the time of its passage, would be in violation of all settled rules of construction. *Thorne v. San Francisco*, 4 Cal. 153, 154.

5. It applies alike to legal and equitable actions.—The Practice Act applies to equitable as well as to legal actions, so far as its provisions are consistent with the rights and remedies administered in Courts of Equity. *Duff v. Fisher*, 15 Cal. 375; *Goodwin v. Hammond*, 13 Cal. 168; *Riddle v. Baker*, 13 Cal. 302.

6. Its effect as to evidence.—The Practice Act, as to evidence at least, governs all cases, legal or equitable, by the same rules. *Goodwin v. Hammond*, 13 Cal. 168.

7. *Stare decisis*.—Though, on questions of practice, previous decisions are entitled to very great weight, still a single decision made without notice of a statute, cannot be invoked as authority on the principle of *stare decisis*. *Duff v. Fisher*, 15 Cal. 375.

The People of the State of California, represented in Senate and Assembly, do enact as follows :

TITLE I.

OF CIVIL ACTIONS AND THE PARTIES THERETO.

- SECTION 1. One form of civil actions, only.
2. Parties to an action, how designated.
 3. Special issues not made by the pleadings, how tried.
 4. Action to be in the name of the real party in interest.
 5. Assignment of a thing in action not to prejudice.
 6. Executor or trustee may sue without the persons beneficially interested.
 7. When married woman is a party, actions by and against.
 8. If husband and wife sued together, wife may defend.
 9. Infant to appear by guardian.
 10. Guardian, how appointed.
 11. Father or mother may maintain action for injury to child.
 12. Who may be joined as plaintiffs.
 13. Who may be joined as defendants.
 14. Parties in interest, when to be joined. When one or more may sue or defend for the whole.
 15. One action may include different parties to commercial paper.
 16. Action, when not to abate by death, marriage or other disability.
 17. Court, when to decide controversy, or to order other parties to be brought in.

§ 1. *One form of civil actions, only.*

There shall be in this State but one form of civil actions, for the enforcement or protection of private rights, and the redress or prevention of private wrongs.

N. Y. Code, § 69. Applicable to Justices' Courts. See § 533, *post*. See § 37-70, *post*.

1. Probate proceedings are not "civil actions" within the meaning of the Practice Act. *Estate of C. G. Scott*, 15 Cal. 220.

2. Special cases.—The term "special cases" in the Constitution, does not include any class of cases for which the Courts of general jurisdiction have always supplied a remedy. *Parsons v. the Tuolumne Water Company*, 5 Cal. 43.

3. The "special cases" must be confined to such new cases as are the creation of statutes, and the proceedings under which are unknown to the general frame-work of Courts of common law and equity. *Id*.

4. "Civil actions" embrace both legal and equitable actions. *Smith v. Richmond*, 19 Cal. 481.

5. The term "civil action" includes the remedies provided by the Practice Act for the enforcement of judgments; and the remedy by *scire facias* is unknown to our practice. The intention was to adopt a uniform and complete system, and if it be a system at all, it is necessarily exclusive, and the introduction of other remedies would destroy its uniformity and defeat the purposes of the act. *Humiston v. Smith*, 21 Cal. 134.

6. Where the Legislature creates a right of action, and makes no special provisions for its enforcement, other than by directing that a civil action may be brought for that purpose, such action may be commenced and prosecuted pursuant to the provisions of the general law regulating proceedings in civil cases, and parties to such actions may take any and all the steps authorized thereby. *Burson v. Cowles*, 25 Cal. 537.

7. But where the Code and the Statute are silent, the rules of the old system of pleading and practice, whether legal or equitable, should be applied, irrespective of former technical distinctions, to all actions under the new system. *Per Bennet, J. Rowe v. Chandler et al.*, 1 Cal. 167.

8. The forms alone of the several actions have been abolished by the Statute; the substantial allegations of the complaint in a given case must be the same under our Practice Act as are required at common law. *Miller v. Van Tassel*, 24 Cal. 463.

9. But while the mere forms of pleadings are simplified, the body of the law is preserved with all those general principles, those wise distinctions, those strict principles and unerring rules, those sound and logical conclusions, which constitute its justice and justifies its glory as a science. *Sampson v. Shaeffer*, 3 Cal. 204.

10. The plaintiff need only state his course of action in ordinary and concise language, whether it be at common law or in equity, without regard to the ancient forms or technicalities; and while there is no difference in the form of a bill in chancery and a common law declaration, the distinction between law and equity is as broad as ever. *De Witt v. Hays*, 2 Cal. 468; *Jones v. Steamship Cortes*, 17 Id. 487; *Smith v. Rowe*, 4 Cal. 6.

11. Every action under our practice may be properly termed an action on the case (17 Cal. 498); but the general principles which govern the case remain unchanged. *Lubert v. Chauviteau*, 3 Cal. 463. In the form of the remedy no distinction exists between legal and equitable rights. *Wiggins v. McDonald*, 18 Cal. 127. All the forms of pleading, and the rules by which their sufficiency is to be determined, are prescribed by the Practice Act (*Payne and Dacey v. Treadwell*, 16 Cal. 243), which supersedes the old rules of pleading. *Chordier v. Schloss and Heilbronner*, 12 Cal. 147.

§ 2. Parties to an action, how designated.

In such action the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

N. Y. Code, § 70, Applicable to Justices' Courts, *post*, § 533.

§ 3. *Special issues not made by the pleadings, how tried.*

When a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial.

§ 4. ¹ *Actions to be in the name of the real party in interest.*

Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act.

¹ Amended 1854, §4; 1855, 303; 1862-4, 29.

1. Applicable to Justices' Courts.—N. Y. Code, § 111; *Van Sant Eq. Prac.* 72. Form of Answer.—See Abb. Forms, vol. 2, p. 31, Vooh's. N. Y. Code, 149 note. *Wedderspoon v. Rogers*, 32 Cal. 569; see *post*, §§ 5, 6, 12, 47.

2. Real party in interest.—The possession of a promissory note, whether obtained before or after maturity, is *prima facie* evidence of ownership. The transfer, with or without value, confers upon the holder the right of action; and a consideration need not be proved unless a defense is interposed which would otherwise preclude a recovery. *McCann v. Lewis*, 9 Cal. 246.

3. His right to maintain the action cannot be questioned on the ground that it belongs to a third party, except the defendant pleads payment to, or offset against that party. *Price v. Dunlap*, 5 Cal. 483; *Gushee v. Leavitt*, 5 Cal. 160.

4. Under our system there is but one form of action to enforce private rights, whether legal or equitable, and the action must be in the name of the real party in interest, with certain statutory exceptions, within which cases of assignment do not come. *Wiggins v. McDonald*, 18 Cal. 126; see § 6, *post*.

5. Whatever the rule may be under the old system, under our system the right of action is in the party sustaining the injury; for, on a recovery, the other party, if entitled to receive the money at all, and if judgment were had in the name of both, would hold it by right of, and as trustee for, the other; and our Practice Act, for convenience, has given the right to sue to the party beneficially entitled to the fruits of the action. *Summers v. Parish*, 10 Cal. 347.

6. Formerly, where a bond was given to an officer, state, or corporation, suit had to be brought in the name of the party holding the legal title, for the benefit of the persons interested; but our statute has introduced a new rule, and, by the provisions of the Practice Act, the suit must be prosecuted in the name of the real party in interest. *Baker v. Bartol*, 7 Cal. 551; *Warmouth v. Hatch*, July T. 1867; *Lally v. Wise*, 28 Cal. 540.

7. On an injunction bond, given to plaintiff and others as obligees, plaintiff alone may sue, if the property on which the injunction operated was his sole property, and the injury his alone, the complaint averring these facts. *Browner v. Davis*, 15 Cal. 11.

8. Where there are several obligees in such an undertaking, promising to pay "said parties enjoined," etc., suit may be brought in the name of one alone, if he be beneficially entitled to the fruits of the recovery. *Prader v. Purkett*, 13 Cal. 588.

9. A stranger to a transaction has no right to sue. *Chenery v. Palmer*, 5 Cal. 131.

10. M, a sheriff, had in his hands money belonging to L, which he had collected on an execution in favor of L and D, and against S; W and C commenced an action against M and L, and others, to enjoin M from paying the money to L, and procured a preliminary injunction, which was served on M alone, but L appeared in the action and defended. The injunction bond ran

to all of the defendants. *Held*, that L. could maintain an action for damages on the injunction bond. *Lally v. Wise*, 28 Cal. 539.

11. Each of the parties to whom an injunction bond is payable may sue on the same for his several damages, even if the bond is made payable to the obligees jointly. *Id.*

12. Defendant purchased land of B, and as part of the consideration, agreed to pay certain debts of B. Neither plaintiff nor the person to whom the debts were owing were parties to this agreement, nor did they assent to it, or attempt to connect themselves with the transaction prior to this suit. Plaintiff is holder of these debts, and seeks to recover them of defendant: *Held*, that plaintiff cannot maintain the action, there being no privity between the parties, no novation of the indebtedness, and no assent to the transaction, which might make the agreement an equitable assignment. *McLaren v. Hutchinson*, 18 Cal. 80. Commented on and questioned in 21 Cal. 178.

13. When A, by agreement between him and B, assented to by C, becomes liable to pay to the latter a debt originally due to him by B, the assignee of C may maintain an action for the debt in his own name, against A. *McLaren v. Hutchinson*, 22 Cal. 187.

14. Where a proof was that defendant, having agreed with B the amount of his (plaintiff's) demand, afterwards met the plaintiff, and stated to him that he (defendant) had agreed with B to pay his (plaintiff's) claim, and was to pay it, and that plaintiff then stated his "willingness to look to defendant": *Held*, that his proof authorized a finding that defendant agreed with plaintiff to pay him his demand. *Id.*

15. A person having an equitable title to land cannot maintain an action to recover possession of the same, but such action must be brought in the name of the person in whom the legal title is trusted. *Emerio v. Penntman*, 26 Cal. 122.

16. The sheriff who levies an attachment by virtue of the process of the Court, has not the right of property in the debt, and cannot maintain an action in his own name for the recovery of the debt. *Sublette v. Mahado*, 1 Cal. 105.

17. An undertaking given to a sheriff to procure a release of goods attached, is for the benefit of the plaintiff, who may sue on it, and if the sheriff takes a sufficient statutory undertaking, he has no further responsibility. *Curial v. Packard*, 29 Cal. 194.

18. If a Mexican grant of land is confirmed to a wrong person, and a patent of the United States for the same issued to a person who did not own or claim to own the grant, and had no right to the patent, the patentee will be deemed to hold the legal title in trust for the real parties in interest. *Salmon v. Lymonds*, 30 Cal. 301. *Vide* 29 Cal. 488; 30 Cal. 301. Property in a vessel, 6 Cal. 462. See further *post* § 12, "Plaintiffs."

19. Causes of action assignable.—An order in the following words: Messrs. F. Huth & Co: Please hold to the order of William Pope & Sons, of Boston, five hundred pounds sterling of insurance effected on cargo of bark Elvina, and oblige, etc., is an equitable assignment of the funds in the hands, or to come into the hands of the drawees, to the payees. *Pope v. Huth*, 14 Cal. 407.

20. A contract not to run boats on a certain line of travel, and on failure to comply with such contract, to pay \$15,000, is an instrument in writing, and assignable by our laws. *California Steam Nav. Co. v. Wright*, 6 Cal. 261.

21. An order drawn upon defendant for an amount due from the defendant, is a *prima facie* assignment of the debt due. Even if it was only for part of a debt, no one could make the objection but the defendants. *McEuen v. Johnson*, 7 Cal. 260; *Wheatley v. Strobe*, 12 Id. 97; *Pope v. Huth*, 14 Id. 408. And the drawees having notice of such assignment, are liable to the payees for the amount, without an express promise to pay it. *Id.*

22. An agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, is assignable, and such assignment gives a right of action in the name of the assignee. *Gray v. Garrison*, 9 Cal. 325.

23. A contract where the owner of a stallion leases him for a season for a sum of money agreed on, and reserves the right to have the horse cover nine mares during the season, is assignable, and the assignee, who is also the pur-

chaser of the horse from the owner, is entitled to all the benefits arising out of the contract. *Doll v. Anderson*, 27 Cal. 250.

24. Before the assignee of such contract is entitled to the benefit of the same, he must give notice to the lessee that he has purchased the same. *Id.*

25. Courts of equity support and give effect to assignments of things which have no present actual existence, but rest in mere possibility; not as a present positive transfer operative in present, but as a present contract, to take effect and attach as soon as the thing comes in esse. *Bibend v. London and Liverpool Fire and Life Ins. Co.*, 30 Cal. 78; *Pierce v. Robinson*, 13 Id. 121.

26. An assignment of a policy of insurance upon a stock of goods, effected in the name of the assignor, made as collateral security for a debt due from the assignor to the assignee, with an agreement that in case of loss by fire, the assignee shall collect the money and apply it on the debt, attaches in equity as a lien upon the amount due on the policy to the extent of the debt, as soon as the loss occurs, as against the assignor and all persons asserting a claim hereto under him. *Id.*

27. Defendant being indebted to E. M. Co., and they to plaintiff, all parties agreed that defendant should pay the amount of his indebtedness to the company to the plaintiff. *Held*, that this was an equitable assignment of the debt, and that the only mode under our practice in which the assignment can be enforced, is by action in the name of the assignee to recover the debt. *Wiggins v. McDonald*, 18 Cal. 126.

28. A contract to perform work on a street in San Francisco may be assigned, and the assignee, if he fulfils the conditions of the same, can enforce it; and if such contract has been assigned, and the assignee performs the contract, the warrant, when issued for the work, may be delivered to the original contractor, who may make demand for its payment. *Taylor v. Palmer*, 31 Cal. 240.

29. If A owns a lot on a street to be improved, and takes the contract, and then assigns to B, who performs the contract, B may sue A for the assessment against his lot. *Id.*

30. A demand by a contractor against the owner of a lot in San Francisco, for an assessment on the lot for street improvements, is assignable. *Cochran v. Collins*, 29 Cal. 129.

31. The assignment of a judgment, which is void because the amount for which it was rendered was beyond the jurisdiction of the Court, carries with it the debt on which it was obtained. *Brown v. Scott*, 25 Cal. 194.

32. A judgment rendered upon an unassignable cause of action for a tort is a debt. *Lawrence v. Martin*, 22 Cal. 173.

33. Torts assignable.—A claim for damage caused by a trespass on land is assignable, and the assignee may maintain an action to recover the same. *More v. Massine et als.*, 32 Cal. 590.

34. A right of action for the wrongful taking and conversion of personal property is assignable, and, under the provisions of the Code, the assignee can recover on the same in his own name. *Lazard v. Wheeler*, 22 Cal. 139.

35. Every cause of action arising out of tort which survives to the personal representatives is assignable. There is no such offence as champerty, or maintenance, known to our law. *Boyd v. Blankman*, Oct. T. 1864.

36. Causes of action not assignable.—Where there is no final settlement of the partnership accounts, and no balance struck, and no express promise on the part of the individual members to pay their ascertained portion of this amount, no action can be maintained therefor in assumpsit, nor can the claim be assigned so that the assignee may sue. *Bullard v. Kinney*, 10 Cal. 63.

37. A cause of action for a malicious prosecution is not assignable. *Lawrence v. Martin*, 22 Cal. 173.

38. The recovery of a verdict in an action for a personal tort does not change the character of the claim to a debt which can be assigned. *Id.*

39. Costs are only an incident of a verdict, and when the verdict is, from its nature, unassignable, an attempt to assign it will not pass the costs. *Id.*

40. A vendor's lien is not assignable. *Baum v. Grigsby*, 21 Cal. 172; *Lewis v. Covilleud*, Id. 178; *Williams v. Young*, Id. 227.

41. Causes of action arising out of personal torts which do not survive to the

personal representatives of a party, are not assignable. *Boyd v. Blankman*, Oct. T., 1864; 3 Kernan, 322; 36 Barb. 270; 2 Kernan, 622; 1 Selden, 347.

42. **Splitting Demands.**—A creditor has the right to assign the debt in parcels, and thus, by splitting up the cause of action, subject his debtor to the costs and expenses of more suits than the parties originally contemplated if the debtor does not object. *Marriou v. Pioche*, 8 Cal. 536; 7 Cal. 260; 6 Cushing R. 282; 13 Mo. R. 300; 11 S. and R. 78; Vooh's. N. Y. Code (8 ed.) p. 182.

§ 5. Assignment of thing in action not to prejudice.

In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before, notice of the assignment; but this section shall not apply to a negotiable promissory note, or bill of exchange, transferred in good faith and upon good consideration, before due.

Applicable to Justices' Courts. See §§ 12, 47, 48, *post*; also, § 4, *ante*, N. Y. Code, § 112.

1. **Negotiable promissory notes transferred as collateral security.**—Where a negotiable promissory note, not yet due, is taken *bona fide* as collateral security for a pre-existing debt, it is not subject to any defense existing at the date of the assignment between the original parties. *Payne v. Bensley*, 8 Cal. 260; *Robinson v. Smith*, 14 Cal. 94; *Naglee v. Lyman*, Id. 450.

2. Where defendant made and delivered to K. & Co. her note, to be used by them only as collateral security to raise money or get credit, and they so used it, and afterwards took it up from the pledgees: *Held*, that K. & Co. could not then sue on the note, as it had answered its purpose; and that plaintiff, having taken the note after maturity and upon no new consideration, took it subject to the same defense. *Coghlin v. May*, 17 Cal. 515.

3. **Assignee and indorsee after maturity, right of.**—An indorsee, after maturity, takes the same interest that the indorsee had, and his claim is subject to the same legal and equitable defense. *Folsom v. Bartlett*, 2 Cal. 164.

4. A negotiable note, taken by the holder after its maturity, is taken subject to all subsisting equities between the maker and the payee, but not such as subsisted between the maker and any intermediate holder. *Warner v. Wilson*, 4 Cal. 309.

5. **Checks, consideration, defenses.**—A check given for a gaming debt is void in the hands of all persons, except a *bona fide* holder, without notice. *Fuller v. Hutchings*, 10 Cal. 523.

6. Where the illegal consideration of a check is admitted, it is incumbent on the holder, even if he took it before dishonor, to show that he took it without notice and for value. *Id.*

7. With a check, the presumption is, that it is given upon a valid consideration, but this presumption being rebutted, the necessity is thrown upon the holder of proving that he received it in good faith, without notice of the illegality of the consideration. *Id.*

8. A party taking a check after its presentation for payment to the bankers upon whom it is drawn and its dishonor, takes it subject to all the defenses to which it was subject in the hands of the original holder. *Id.*

9. **Recovery, extent of.**—Where the consideration passing between the indorsee and indorser is not equal to the amount of the paper, the indorsee in an action against the indorser can recover only the consideration he has actually paid. *Coye v. Palmer*, 16 Cal. 158.

10. **Equitable assignments.**—The assignee of a judgment is only the holder of an equity, with the right to use the judgment and the name of the plaintiff

to enforce it, and he stands in the shoes of the assignor as to all defenses which existed against the judgment between the parties to it. *Wright & Co. v. Levy*, 12 Cal. 257; *Northam v. Gordon*, 23 Cal. 255; *Hobb v. Duff*, id. 596.

11. A certificate of deposit of \$1,800, payable to the order of V, was indorsed, sold and delivered by V to L for four hundred dollars. Payment was then at once demanded of the maker, and notice of protest served on V. Subsequently, L transferred the certificate to plaintiff: *Held*, that plaintiff can recover of V only the four hundred dollars received by him, the certificate being subject, in the hands of plaintiff, to all the equities between the indorser and indorsee. *Coye v. Palmer*, 16 Cal. 158.

12. Equity upholds assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no actual existence, but vest in possibility—provided they are fairly made and are not against public policy; and a contract for such interest will take effect as an assignment when the subjects to which they refer have ceased to vest in possibility and have ripened into reality. *Pierce v. Robinson*, 13 Cal. 123; *Pope v. Huth*, 14 Cal. 403; *Bibend v. L. and L. Ins. Co.*, 30 Cal. 78.

13. On suit upon an assigned account, the defendant may plead any defense he may have against the assignor before notice of the assignment, not as a counter claim, as that would be in violation of section forty-seven, but must be set up as an equitable defense, on the ground that the assignee takes the demand subject to an existing equity. *Duff v. Hobbs*, 19 Cal. 646.

14. Choses in action fraudulent between the parties to it.—A non-negotiable chose in action, created by the immediate parties to it for the purpose of defrauding creditors, cannot be impeached in the hands of an innocent assignee by the creditors of the debtors making such choses in action. *Wright & Co. v. Levy*, 12 Cal. 257.

15. One who makes an assignment of property for the sole purpose of hindering, delaying and defrauding his creditors, cannot maintain an action against the assignee to compel a re-assignment of it or a judgment for its value, if a re-assignment cannot be had, nor can a purchaser from the assignor, who buys with full knowledge of such fraudulent assignment, maintain such action. *Gregory v. Haworth*, 25 Cal. 655.

16. Notice of assignment not necessary.—When A sold to B a bill of goods to arrive on a certain vessel, B paid part of the purchase money, and was to pay the balance as soon as the vessel arrived. B assigned the contract to C, who, within a reasonable time after the arrival of the vessel, tendered the balance of the money to A, and demanded the goods. *Held*, that C was entitled to the goods, and no notice of the assignment was necessary to charge A. *Morgan v. Lowe*, 5 Cal. 325.

17. Judgments.—Plaintiff in execution, after assigning his judgment, pretended falsely and fraudulently to be the owner of it, and so pretending, made a contract to discharge the judgment by taking the note of third persons, not negotiable in the mercantile sense, in payment. The makers of the note agreed to this, under the supposition induced by him that he was the owner: *Held*, that the makers of the note, on discovering that the plaintiff was not the owner of the judgment, properly refused to pay the note, even to assignees, before maturity thereof. *Mitchell v. Hackett*, 14 Cal. 665.

18. An assignee of a judgment and of the Sheriff's certificate of a sale thereunder, stands in the same position as his assignor, the plaintiff, after the judgment has been reversed, and the sale will be set aside and the property restored to the defendant where no loss or injury will be done to the assignee. *Reynolds v. Harris*, 14 Cal. 681.

19. The purchaser of a judgment entered by default takes it subject to the right of the defendant, upon showing sufficient grounds to have the default and judgment set aside, and to be let in to defend the action; and in this respect stands in no better position than his assignor. *Northam v. Gordon*, 23 Cal. 255.

20. A judgment is property which may be purchased like any other property. The purchaser is bound to inquire into the defense of the debtor. *He*

has the means to do this; but he could not be held to inquire into latent equities existing in the hands of third persons; and hence, as to third persons, he stands unaffected by frauds of which he had no knowledge, express or constructive. *Wright & Co. v. Levy et al.*, 12 Cal. 257.

21. In the purchase of a judgment, the rule of *caveat emptor* applies, so far as third parties are concerned, in the same manner as in the purchase of any other personal property. If the assignor has no title, the purchaser will take none, whether he have notice of a former sale or not. *Mitchell v. Hockett et al.*, 25 Cal. 544.

22. An assignee of a judgment, although a purchaser for a valuable consideration and without notice, takes subject to a right of set-off against the judgment existing at the time of the assignment. *Porter v. Liscom*, 22 Cal. 430.

23. The purchaser of a judgment, although he buys in good faith and for a valuable consideration, takes the same subject to any right of set-off existing between the parties at the time of his purchase. *Hobbs v. Duff*, 23 Cal. 596.

24. An assignee of a judgment is deemed to have notice of all matters disclosed by the record and proceedings in the action in which the judgment was rendered; and where that judgment or the proceedings therein disclose an equitable right of set-off existing in favor of the defendants against the plaintiff, the assignee cannot claim to be a *bona fide* purchaser. *Id.*

25. B recovered a judgment against A and others, and thereafter assigned it for a valuable consideration to C. Subsequent to the assignment, and before notice thereof to the defendants, they paid the amount of the judgment, less \$29 50, to the sheriff, who had served a garnishment upon them in D v. B, and to a constable, on an execution held by him in V v. B, action brought by B against A and others to recover the amount of his judgment against them. *Held*, that the case did not come under the provisions of the fifth section of the Practice Act, but under section 240, and that as the defendants were not in fact debtors of B, but of C, at the time of the payments, they were not discharged from liability on the judgment against them in favor of B. In order to bring a party within the terms of the 240th section of the Practice Act, there must be a judgment and an execution thereon against property, and the person making the payment must be indebted at the instant to him against whom the execution runs. *Brown v. Ayres et al.*, Oct. T., 1867.

26. Where in the same action two judgments were entered, one for the plaintiff for a certain sum, and one for the defendant for a less sum: *Held*, that defendant had a right to set off his judgment *pro tanto* against that of the plaintiff, and that this right could not be defeated by any assignment by plaintiff of his judgment before application for the set-off. *Porter and Allen v. Liscom*, 22 Cal. 430.

27. Where a judgment, against which a right to set-off another judgment rendered in the same action exists, is assigned, the assignee may be brought into the Court upon a proceeding, by petition and motion, and will be bound by an order made therein directing a set-off. *Id.*

28. When a creditor, having a debt due him by mortgage, assigns the debt and mortgage, a judgment in favor of a third person against the creditor, purchased by the debtor after the assignment, but before notice of it to him, constitutes an offset *pro tanto* to the debt in an action upon it by the assignee. *McCabe v. Grey*, 20 Cal. 509.

29. The purchaser of a judgment on sale under execution and levy, takes as assignee, only assuming that a judgment is the subject of levy and sale. The sheriff's sale of a judgment passes no title other than would pass by an assignment by the owner. *Fore v. Manlove*, 18 Cal. 436.

30. A judgment is not negotiable like a bill of exchange by the law merchant, but is a mere chose in action, vesting an equitable right in the assignee thereof to the proceedings of it, with the right to the usual and legal means of collecting the amount due; and between two *bona fide* purchasers of a judgment, the purchaser first in time is prior in right. *Id.*

§ 6. ¹ *Executor, trustee, etc., may sue without joining the persons beneficially interested.*

An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person or persons for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.

¹ Amended 1854, 84. Applicable to Justices' Courts: N. Y. Code, § 113. Abb. Forms, Nos. 174, 175, 185 and 187.

1. **Executor and administrator, plaintiff.**—An administrator, by our statute, being entitled to possession of the real estate of the deceased, may maintain ejectment. *Curtis v. Herrick*, 14 Cal. 117.

2. Where a patent of land was issued by the United States to executors, and an executrix of the last will and testament of one H, in trust for the heirs and devisees of said H, and the executrix subsequently intermarried with one of the executors: *Held*, that under the statute of this State the authority of the executrix ceased by her marriage, and that ejectment based upon the patent was properly brought in the names of the executors. *Teschemacher v. Thompson*, 18 Cal. 11.

3. Executors have the right to institute actions under the general authority conferred upon them by the statute. No special authorization from the Probate Court is necessary in such cases. *Halleck v. Mizer*, 16 Cal. 579.

4. A suit in the name of an executor or an administrator is properly brought at any time before administration is had, or a decree of distribution is made by the Probate Court. *Curtis v. Sutter*, 15 Cal. 259; *Teschemacher v. Thompson*, 18 Cal. 20.

5. The Mexican nation made a grant of land to P, which, after the cession of California to the United States, was confirmed by decree of the Board of Land Commissioners, from which an appeal was taken to the United States District Court. Pending the appeal, P died, leaving a will. An order was made in the United States Court, on petition of the heirs of P, and the executors of the estate, substituting the heirs in the proceedings in place of P, and the Court then confirmed the land to the heirs, and it was surveyed, and the survey approved. Subsequently E was appointed administrator, with the will annexed. *Held*, that the legal title was in the heirs, and that the administrator could not maintain an action to recover possession of the same. *Emeric v. Penniman*, 26 Cal. 122; *Salmon v. Symonds*, 30 Cal. 301.

6. A debt due to the intestate is a personality, and does not descend to the heir like realty, but vests in the administrator, who has the sole right to maintain actions to collect the same, and it is error to join the heir as plaintiff with the administrator in an action to enforce its collection. *Graffan v. Wiggins*, 23 Cal. 16.

7. If a party brings suit on a note made payable to him as administrator, and is at the time in possession of the same, evidence is not admissible on behalf of the defendant to prove that the plaintiff is not the real party in interest, even if the money loaned for which the note was given belonged to the estate of the deceased. *Corcoran v. Doll*, 32 Cal. 82.

8. The action for the foreclosure of a mortgage upon real property is not brought for the possession merely of the property, except as such possession may follow the sheriff's or master's deed, but to subject to sale the title which the mortgager had at the time of executing the mortgage, and to cut off the rights of parties subsequently becoming interested in the premises; and executors and administrators do not possess the title, but only a temporary right to the possession. *Burton v. Lies*, 21 Cal. 87.

9. In this State a civil action for damages for the death of a person can be maintained only by the administrator or executor of the deceased. *Kramer v. Market Street Railroad Company*, 25 Cal. 435.

10. Executor and administrator, defendant.—It was necessary to file this bill and make the administrator, the widow and the infant parties, to rebut the presumption of ownership on the part of the estate, arising from the fact that the real estate stood upon the record in the name of deceased, and the administrator had possession of the personal property. These objects could only be accomplished by proceedings in the District Court, as the Probate Court did not possess the judicial means of giving relief. *Gray v. Palmer*, 9 Cal. 616.

11. In case of joint and several contracts, an administrator cannot be joined with the survivor. *Humphreys v. Crane*, 5 Cal. 173.

12. In actions upon joint and several contracts or obligations, an administrator cannot be joined with the survivor, because the one is joined *de bonis testatoris*, and the other *de bonis propriis*. *May v. Hanson*, 6 Cal. 642.

13. In this State, all the property, both real and personal, belonging to the estate of a deceased person, goes into the possession of the administrator, who is, therefore, a necessary party to all suits affecting it. *Harwood v. Marye*, 8 Cal. 580; 9 Cal. 123.

14. The general right to sue an administrator was taken away by the statute. The claimant must present his claim, otherwise he can maintain *no action thereon* against an administrator or executor. Wood's Dig. 404, § 136. Mortgage and liens of record form no exception to the rule. *Ellissen v. Halleck*, 6 Cal. 393; *Falkner v. Folsom*, Id. 412; *Hentsch v. Porter*, 10 Id. 559; 27 Cal. 354.

15. Where an administrator does not set up his privileges by demurrer or answer, but suffers judgment to go by default, it is a confession that he is properly sued. *Hentsch v. Porter*, 10 Cal. 555.

16. In an action to recover judgment on a promissory note, the suggestion of the death of the defendant, and the substitution of his administrator and the continuance of the suit against him, subjects the proceedings to such rules of the Probate Act as are applicable to proceedings for the collection of claims against an estate of a deceased person. *Meyers v. Mott*, 29 Cal. 359.

17. Though the defendant in such an action be described in the caption of the complaint as administrator, yet the facts show that it is not sought to charge him as administrator, and no relief is sought against the estate. *Held*, that the objection that he is sued in his representative capacity is untenable. *People v. Houghtaling*, 7 Cal. 348; *Lathrop v. Bampton*, 31 Cal. 17.

18. Trustee of an express trust, who is.—Bonds taken in the name of the people of the State for the benefit of others should be prosecuted, not in the name of the people, but in that of the party in interest. *Baker v. Bartol*, 7 Cal. 551.

19. Defendants were the holders of a mortgage executed by the Yreka Water Company and B. to them, to secure advances made and to be made by themselves and others, to said company. Plaintiff had made advances to the company, and was one of the persons intended to be secured by the mortgage, though not a party thereto. Defendants assign the mortgage, receive the consideration therefor, but refuse to pay any portion of the money to plaintiff, who sues for money had and received to his use. *Held*, that the action lies; that defendants are in possession of money which, in equity and conscience, they are bound to pay over. *Held* further, that defendants occupied toward plaintiff the position of trustees, and that the money sued for was received in that character; that it is of no consequence that the trust was created by a contract to which plaintiff was not a party, as he subsequently assented to it, and defendants cannot now repudiate it and retain money which they would not otherwise have received. *Kreutz v. Livingston*, 15 Cal. 344.

20. Where a note is made payable to W. for the benefit of another person, W. is a trustee of an express trust within the meaning of the sixth section of the Practice Act, and as such is entitled to sue upon the note. *Winters v. Rush*, Oct. T. 1867.

21. Trustee, who is not.—An attorney in fact does not hold the character

of trustee, and is not a necessary party to a suit, to represent the interest of the principal. *Powell v. Ross*, 4 Cal. 197.

22. A guardian of an infant appointed by the Probate Court is not a trustee of an express trust within the meaning of section six of the Practice Act. *Fox v. Minor*, 32 Cal. 111.

§ 7. [1867-8.] *When a married woman is a party—actions by and against.*

When a married woman is a party, her husband shall be joined with her, except:

1st. When the action concerns her separate property or her right or claim to the homestead property, she may sue alone.

2d. When the action is between herself and her husband she may sue or be sued alone.

Amended Stat. 1867-8. 550. Applicable to Justices' Courts: See N. Y. Code, § 114, Abb. Forms, Nos. 198-200.

1. **This section construed.**—The seventh section of the Practice Act places married women, in respect to the cases therein mentioned, upon a common level with all other parties to actions, and imposes on them the responsibilities it imposes on other parties. *Leonard v. Townsend*, 26 Cal. 442.

2. **When husband and wife shall be joined.**—The law which deprived a married woman of the right to make contracts, is not altered by the statute, unless in respect to the property specified by it, and she cannot bring suit in her own name upon a contract which she was not authorized by the statute to make. *Snyder v. Webb*, 3 Cal. 83.

3. A *femme covert* cannot contract under the laws of this State, so as to render her liable in a suit at law. *Rowe v. Kohle*, 4 Cal. 286.

4. A wife cannot sue alone to recover the homestead; it is a joint estate, with right of survivorship, and both husband and wife must join in the action. *Poole v. Gerrard*, 6 Cal. 71.

5. When the homestead was claimed by the husband in an action in which he was alone defendant, to foreclose a mortgage made by him alone since his marriage, neither the rights of the husband or wife could be affected by the proceedings in that case, the wife not being a party. Legal proceedings, to be conclusive against either, must embrace both. *Revalk v. Kraemer*, 8 Cal. 66.

6. In an action against the husband alone, the homestead right cannot be determined. Both parties must be before the Court. *Id.* 74.

7. The homestead right cannot be individually asserted; both parties must join. *Cook v. Klink*, 8 Cal. 347.

8. In an action to foreclose a mortgage against a husband where the defendant sets up the right of homestead, the Court should order the wife of defendant to be brought in as a party, as no decision upon the question of homestead can be conclusive, either upon the husband or the wife, unless both are parties. *Marks and Wife v. Marsh*, 9 Cal. 96; *Sargent v. Wilson*, 5 Cal. 504.

9. Where suit is brought in the name of the husband and wife, and no objection is made to the joinder of the wife, and judgment is obtained, and afterward defendant executes an undertaking on appeal to the husband and wife, and suit is afterward brought on the undertaking in the name of the husband and wife: *Held*, that the defendants are concluded by the acts of the appellant, and that the wife is properly joined in the suit on the undertaking. *Tisot and Wife v. Darling*, 9 Cal. 278.

10. An action brought by the husband and wife against a steamer for breach of a contract to carry the wife to New York via Nicaragua, the alleged breach consisting in carrying the wife to Panama, and causing her detention there and consequent illness, and other injuries, though based on a contract, sounds

in tort, and the wife is a proper and necessary plaintiff. *Warner and Wife v. Steamship Uncle Sam*, 9 Cal. 697.

11. The wife is a proper party defendant in a suit to foreclose a mortgage executed upon premises claimed as a homestead. If not made such a party she may intervene, or, by permission of the Court, be allowed to file a separate answer, the plaintiff having the liberty to amend his complaint if any matters are set up in the answer which he might wish to anticipate by further allegations. *Moss v. Warner and Wife*, 10 Cal. 296.

12. The wife has no right in the homestead, independent of the husband, which she can enforce against his consent. She cannot maintain a suit for it in her individual name. *Gutod v. Gutod*, 14 Cal. 506.

13. Where suit is brought against a female who subsequently marries, her husband must be made co-defendant. But this should be done, and an averment of the marriage made, by a supplemental complaint, and not by an amendment to the original. *Van Maren v. Johnson*, 15 Cal. 308; *Kays v. Phelps*, 19 Cal. 128.

14. In an action by the wife for money, which, when recovered, will be her separate property, subject to the management and control of the husband, he is properly joined with her as plaintiff. *Id.*

15. In a suit to foreclose a mortgage executed by the husband to plaintiff, the wife may be made defendant if she claim the premises as her separate property, by virtue of a previous conveyance from the husband to her. *Kohner v. Ashenault*, 17 Cal. 578.

16. Husband and wife must join in an action for an injury done to the person of the latter, and it is immaterial that the injury is charged to have been committed in violation of a contract. *Sheldon v. Steamer Uncle Sam*, 18 Cal. 526.

17. When husband and wife cannot be joined.—Husband and wife cannot recover jointly in an action by them *ex contractu* for the breach of a contract made with defendant for the transportation of the wife from San Francisco to New York. *Sheldon v. Steamship Uncle Sam*, 18 Cal. 526.

18. In a suit for damages to the common property, the wife should not be a party, and if so made the complaint is demurrable. *Id.*

19. But if, in such action, no demurrer be interposed, and if the facts stated and proven show that plaintiffs are entitled to relief for fraud practiced by defendant, or for personal injury to the wife, then the action to that extent is well brought, and relief will not be denied on the ground that the same facts would support an action on the contract in which the husband alone can recover. *Id.*

20. When husband must sue alone.—For injury effected by deceit or otherwise, to the common property, or business carried on by means of the common property, the remedy is by the husband alone, without the wife. *Barrett v. Truicksbury*, 18 Cal. 334.

21. Husband and wife cannot recover jointly in an action by them *ex contractu* for the breach of a contract made with defendant for the transportation of the wife from San Francisco to New York. *Sheldon v. Steamer Uncle Sam*, 18 Cal. 526.

22. So, where plaintiffs—husband and wife—bring an action of damages for deceit, the complaint averring in effect that defendant's wife executed a deed of a certain lot to plaintiffs, who paid therefor \$3,000—the purchase being induced by the fraudulent representations of defendant that his wife's title was perfect, etc.—and also that in consequence of this title proving worthless, plaintiffs lost the lot, with valuable improvements by them placed thereon, and that their business of hotel keeping conducted thereon, and of street grading connected therewith, was destroyed, etc.: Held, that demurrer for misjoinder of plaintiffs, lies; that the money paid for the lot, the lot itself, and the business, are, on the face of the complaint, common property, there being no averment that the wife had any separate interest in the money or in the business. *Barrett v. Truicksbury*, 18 Cal. 334.

23. When husband and wife may join or be joined.—The Practice Act

gives to a married woman the right to sue without her husband, where the action concerns her separate estate. *Snyder v. Webb*, 3 Cal. 83.

24. The Practice Act permits the wife to sue alone when the action is between herself and her husband. If it is necessary to introduce other parties, their introduction cannot affect her rights. *Kashaw v. Kashaw*, 3 Cal. 312.

25. In the exceptional cases mentioned in section seven of the Practice Act, the statute is not obligatory on the wife to sue or defend alone; it confers only a privilege which in many cases it may be important for her to assert for the protection of her interests, and in the exercise of which the fullest liberty should be accorded her. When the action concerns her separate property, and is not between herself and her husband, she may sue with or without him. *Van Maren v. Johnson*, 15 Cal. 308.

26. When the action concerns the separate property, she may seek the aid of the Court with or without the aid of her husband. *Id.*

27. Where the wife executed and delivered to defendant a deed of her separate property in consideration of his promise to pay her five hundred dollars, and sues for the money, alleging that it has not been paid, and that she has never consented, orally or in writing, that her husband might receive or use it: *Held*, that although his misjoinder as plaintiff is not ground of demurrer, still, if the money has been paid to him, that fact may constitute a defense to the action. *Kays v. Phelan*, 19 Cal. 128.

28. In an action brought to recover the purchase money of a lot belonging to a married woman as her separate property, the husband may join with her, but his nonjoinder is not a ground for demurrer. *Kays v. Phelan*, Oct. 1861.

29. The husband of a married woman is properly joined with her as a party defendant in an action upon a partnership obligation contracted by the wife and third persons as partners previous to the marriage and while she was a *femme sole*. *Keller v. Hicks*, 22 Cal. 457.

30. The fact that a wife executes a mortgage with her husband, is a sufficient reason for making her a party defendant along with her husband in an action to foreclose the same without any allegation as to her interest in the property mortgaged. *Anthony v. Nye*, 30 Cal. 401.

31. The wife may join with her husband as co-plaintiff in an action to recover possession of her separate estate, but is not required to do so. She may sue alone. *Caldernood v. Pyser*, 31 Cal. 333.

32. If the promissory note is the separate property of the wife, suit may be brought on it in her name alone, or the husband and wife may sue jointly. *Corcoran v. Doll*, 32 Cal. 82.

33. **Wife, when she must be sued alone.**—In an action against a married woman, alleged to be a sole trader under the Act of April, 1852, on a contract executed by her as such, it is improper to join her husband with her as defendant, and a complaint so drawn is demurrable. *McKune v. McGarvey*, 6 Cal. 497.

34. In an action brought by a married woman concerning property belonging to her as sole trader, under the Act of 1852, the husband need not be joined. *Guttman v. Scannell*, 7 Cal. 455.

35. A married woman who became a sole trader under the Act of 1852, for the purpose of keeping a public house and farming, could lawfully execute and deliver in her own name, a valid promissory note, for the purchase money of land conveyed to her for use in said business, and could also execute, in her own name, a valid mortgage on the same to secure the purchase money. *Camden v. Mullen*, 29 Cal. 564.

36. **Prochein ami discarded.**—The object of the act is to take away the necessity of suing by *prochein ami*, and being a remedial statute, must be beneficially construed. *Kashaw v. Kashaw*, 3 Cal. 312.

37. **A judgment for costs** may be rendered against a married woman. *Leonard v. Townsend*, 26 Cal. 442.

§ 8. *If husband and wife be sued together, the wife may defend.*

If a husband and wife be sued together, the wife may defend for her own right.

Applicable to Justices' Courts.

1. Where the defense of the wife is a special one, she can defend for her own right, as well when sued jointly as if the trial was separate. *Duprez v. Duprez*, 5 Cal. 387.

2. When the wife is made a party defendant with her husband, it is no objection to the right of the plaintiff to recover, that the wife was denied the benefit of a separate trial. *Id.*

3. To enable her to defend in her own right, she must possess as defendant the rights of a *femme sole*, and be able to make as binding admissions in writing in the action as other parties. *Alderson v. Bell*, 9 Cal. 315.

§ 9. *Infant to appear by guardian.*

When an infant is a party, he shall appear by guardian, who may be appointed by the Court in which the action is prosecuted, or by a Judge thereof, or a County Judge.

Applicable to Justices' Courts. See N. Y. Code, § 115. For San Francisco, see Rules of Court, XXX, XXXI, XXXII.

1. Where a will appoints a guardian, there is no necessity for the issuance of any letters of guardianship to authorize the guardian to act. The guardian's authority comes directly from the will. *Norris v. Harris*, 15 Cal. 255.

2. The Court has no right to appoint a guardian *ad litem*, until the infant is properly brought into Court. *Gray v. Palmer*, 9 Cal. 616.

3. Where the interest of the minor requires it, the Court in which an action is pending will appoint a guardian *ad litem*, even though the minor may have a general guardian. *Gronfier v. Puymisol*, 19 Cal. 629.

4. In suit for partition against infants who appeared by guardians *ad litem*, and answered denying that plaintiff was owner, and that one W, was of a portion, and the Court rendered a decree forever barring all defendants of any claim to the premises: *Held*, said decree to be *coram non jure* and void; that the guardians *ad litem* had no power to admit away by their answer the rights of the infants, and the Court had no power to give effect to such admission, as it is a matter not within the scope of their appointment, or the purview of the complaint. *Waterman v. Lawrence*, 19 Cal. 210.

5. Guardians *ad litem* appointed to represent an infant in a case of partition, have power to defend for the infant solely against the claim set up for partition of the common estate; and their acts beyond this special limited power are void. *Id.*

6. Under our statutes, the disability of infancy attaches as well to a *femme covert* under age, as to a *femme sole*, subject only to the Act of 1858, 108; which makes married women under eighteen, and married with the consent of their parent or guardian, of full and lawful age. *Mages v. Welsh*, 18 Cal. 155.

7. A general guardian of an infant has authority to institute an action on behalf of his ward, and where the body of the complaint shows the general guardianship of the plaintiff; a mistake in the designation of the plaintiff as guardian *ad litem* in the title of the action is one of no importance. *Spear v. Ward*, 20 Cal. 660.

8. A guardian of an infant cannot sue in his own name to recover money due the infant. Such action must be brought in the name of the infant by his guardian. *Fox v. Minor*, 32 Cal. 111.

9. When the infant heir was sued upon a specially obligation of the ancestor chargeable upon the inheritance, he might pray that the proceedings be stayed until he should attain his majority. This privilege was confined to the heir alone, and did not extend to devisees. *Joyce v. McAvoy*, 31 Cal. 273.

10. Courts of equity, in cases where the equity depended upon the liability of the heir to pay out of the descended assets adopted a similar practice; and in a certain class of cases affecting the title of infants to real estate, by a kind of analogy to this practice, courts of equity adopted another rule by which a clause was inserted in the decree giving the infant a day after becoming age to show cause against it. *Id.*

§ 10. *Guardian, how appointed.*

The guardian shall be appointed as follows:

1st. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon the application of a relative or friend of the infant.

2d. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant.

Applicable to Justices' Courts. N. Y. Code, § 116, Abb. Forms, No. 66-98.

1. The provisions of this and the preceding section relating to the appointment of guardians *ad litem*, where infants are parties, only apply where there is no general guardian, or where he does not act. *Gronfier v. Pugmisol*, 19 Cal. 629.

2. A general guardian of an infant has authority to institute an action on behalf of his ward, and where the body of the complaint shows the general guardianship of the plaintiff, a mistake in the designation of the plaintiff as guardian *ad litem* in the title of the action, is one of no importance. *Spear v. Ward*, 20 Cal. 659.

§ 11. *Father or mother may maintain action for injury to child.*

A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child; and a guardian for the injury or death of his ward.

Applicable to Justices' Courts. See Hittell's Dig. Par. 2325-2327; same Stat. 1862, 447.

1. The eleventh section of the Practice Act, which provides that the father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward, does not create a right of action where none existed before, but merely designates the persons by whom an action, for the causes therein mentioned, which then existed, or might thereafter be created by statute, should be brought. *Kramer v. Market Street R. R. Co.*, 25 Cal. 435.

2. At the time the Practice Act was passed, the death of a person constituted no cause of action; and the eleventh section of that Act, so far as it designates the parties by whom an action for the death of a person may be brought, is repealed by the Act of 1862, which provides that "every such action shall be brought by and in the names of the personal representatives of such deceased person." *Id.*

3. A civil action for damages for the death of a person *per se*, cannot be

maintained by any one at common law; and in this State it can be maintained only by the administrator or executor of the deceased. *Id.*

4. An action for the death of a person can only be maintained in this State by virtue of the provisions of the Act entitled "An Act requiring compensation for causing death by wrongful act, neglect, or default"—passed April 26, 1862. (Statutes of 1862, p. 447.)

§ 12. Who may be joined as plaintiffs.

All persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this Act.

N. Y. Code, § 117. Applicable to Justices' Courts.

1. See further § 4, *ante*, "Real parties in interest," for proper parties plaintiff.

2. Administrators may sue, when.—See § 6, *ante*.

3. Action to quiet title to land.—See *post*, § 254.

4. Generally.—A bill in equity is not multifarious if there is a common liability in the defendants, and a common interest in the plaintiffs, or if the interest of the plaintiffs are the same, and the defendants have not a co-extensive common interest, but their interests are acquired under different instruments from the same source of title. *Wilson v. Castro*, 31 Cal. 420.

5. Parties who have a common interest in annulling a patent, although they have no joint interest in the land adverse to the patentee, may be joined as plaintiffs in action to procure its cancellation. *People v. Morrill*, 26 Cal. 352.

6. If A enters into a contract with B, for the conveyance of a tract of land, whereby B acquires a right to a conveyance of the entire tract, and B afterwards assigns to two or more persons, giving to each a separate conveyance of his equitable title to distinct and separate parcels of the land, the assignees of B may maintain a joint action against A for a specific performance of the contract. *Owen v. Frink*, 24 Cal. 177.

7. If private citizens have an interest in the lands granted by a patent, and are threatened with injury by the patent, the information should be filed in the name of one or more of such persons, provided they are without adequate remedy at law; and in such case the relator's personal complaint should be joined to and incorporated with the information. *People v. Stratton*, 25 Cal. 244.

8. Several persons may be joined as plaintiffs to enforce their liens in the suit under the Mechanic's Lien Law, although there is no community of interest between them. *Barber v. Reynolds*, Oct. T. 1867; and see *Owen v. Frink*, 24 Cal. 177, where it is stated that the general rule is, that unconnected parties may join in bringing a bill in equity, where there is one connected interest among them all, centering in the point in issue in the cause.

9. Agent, when he may sue.—The note sued on, payable to the plaintiff, although it describes him as an agent for another, does not take away the right of the agent to sue in his own name at law. *Ord v. McKee*, 5 Cal. 515.

10. Where two persons were employed by the claimants of a tract of land under a Mexican grant, as agents to procure a confirmation of the grant in the United States, and services are thus rendered, it is individual in its character, and separate actions may be maintained by such agent for his expenses thus incurred. *Conner v. Hutchinson*, 12 Cal. 127.

11. An agent to whom a check is made payable in his own name may maintain an action thereon, though the debt be due to his principal. 2 Bosw. 471; *Fisk v. Jacobson*, 5 Bosw. 514.

12. A sheriff who has attached property belonging to the defendant in the hands of a third person, may bring any action necessary to obtain possession of such property. *Kelly v. Brensing*, 32 Barb. 601.

13. Where the principals are minors, it was held that the agent might sue

upon a contract made with him as such, and by which he was personally bound, without any assignment from the principals. *Nelson v. Nixon*, 13 Abbott, 104.

14. The uncontroverted allegations in a complaint of a sale of goods by the plaintiff as the factor or agent of his principal, and the promise of the defendant to pay the plaintiff for them, are sufficient to vest the plaintiff with a right to collect and sue for the price in his own name. *Reilly v. Cook*, 22 How. 93.

15. The agent of a foreign corporation may maintain an action in his own name upon a subscription note payable to the plaintiff, as "executive agent of the company for stock of the corporation to be issued to the signer." *Considerant v. Brisbane*, 22 N. Y. 389.

16. **Agent, when he cannot sue.**—An agent, ordinarily, cannot sue in his own name in respect to the subject-matter of his agency, and this rule applies to consignees and indorsees of bills of lading, when they are in truth but the agents of the shippers. *Lineker v. Ayeshford*, 1 Cal. 75. H purchased goods of P and M, which were consigned to P, an agent; H failing to pay for the goods upon delivery, P brought an action to recover the purchase money; *Held*, that P had no right of action in his own name. *Semble*, if the purchase had been made directly from P, although the goods belonged to another, the rule would be different. *Phillips v. Henshaw*, 5 Cal. 509.

17. A, of Liverpool, shipped certain goods to San Francisco, and indorsed the bills of lading to the plaintiff, his agent, and became a bankrupt before the arrival of the goods. *Held*, it appearing on the face of the complaint that the plaintiff was a mere naked agent of the shippers, that he could not recover the goods in his own name of the master of the ship, who claimed to hold the goods for the assignment in bankruptcy of A. *Lineker v. Ayeshford*, 1 Cal. 78.

18. The indorsement of a bill of lading *prima facie* vests the property in the goods mentioned therein in the indorsee, but a bill of lading is not a negotiable instrument, so far as to enable an indorsee who has no property, either general or special, in the goods, and no lien thereon for advance or otherwise, to sue the master of the ship in his own name for non-delivery of the goods, when it appears on the face of the complaint that the plaintiff, the indorsee, is a mere naked agent of the shippers. *Id.*

19. **When the principal may sue on contracts made with the agents.** A principal may sue in his own name on a contract in writing made and signed by his agent without disclosing his principal; but, in order to maintain the action, the principal must show the agency, and the power of the agent to bind him at the time. But, in such a case, the defendant may make the same defenses against the newly discovered principal as he could against the agent with whom he dealt as principal. *Ruiz v. Norton*, 4 Cal. 358.

20. Under the one hundred and fifty-fourth section of the Act of 1856 (370), the person entitled to recover the penalty is the party who contracts or offers to contract for the transmission of the dispatch. He may, probably, do this by his agent or servant. But when the contract is made by a party as agent of another, in order to give a right of action to the principal, the fact of agency must be shown. *Thurn v. Alta Telegraph Co.*, 15 Cal. 472.

21. A principal has a right to waive a tort against his factor, and bring an action to compel him to account, and for the net proceeds arising from the sales, when the plaintiff can only recover the net proceeds of sales effected by him, after deducting necessary charges and commissions. *Lubert v. Chauveteau*, 3 Cal. 462.

22. The owner of a ship chartered by and in the name of his agent, may, although he is not mentioned in the charter party, be shown by extrinsic evidence to be the principal in the contract, and will be allowed to avail himself of its provisions. *Brooks v. Minkurn*, 1 Cal. 482.

23. **Assignee and indorsee.**—An assignment of a contract as a security for a debt, and also in consideration of a covenant not to sue upon the debt, entitles the assignee to sue on the contract in his own name. *Warner v. Wilson*, 4 Cal. 310.

24. An agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, is assignable, and such assignment

gives a right of action in the name of the assignee. *Gray v. Garrison*, 9 Cal. 525.

25. Under our statute of April, 1850, the holder of a non-negotiable note has a right of action, not only against his immediate assignor, but also against previous assignors; in short, against every person from whom the note has passed by assignment. *Hamilton v. McDonald*, 18 Cal. 128.

26. To enable the assignee of a judgment to sue on the appeal bond filed in the cause, he must have an assignment of the bond. *Moses v. Thorne*, 6 Cal. 88.

27. Personal property beyond the limits of this State, assigned in trust to pay the creditors of the assignor and assignee, both residing and being at the time in the foreign jurisdiction where the property was, and possession being taken by the latter, vests in the assignee according to the *lex loci*, and his title will be maintained here against execution creditors of the assignor. *Forbes v. Scannel*, 13 Cal. 242.

28. The holder of negotiable paper, indorsed before maturity, is supposed to be the *bona fide* owner of the same, and all intendments are in favor of his right. *Palmer v. Goodwin*, 5 Cal. 458.

29. The presumption of the law is in favor of such holder, to rebut which it is necessary to show by competent testimony that he is not the *bona fide* holder, or that the note was not indorsed until after maturity, or some other fact from which the law will imply a fraud. *Id.*

30. Under our system of practice, an action may be brought in the name of the assignee as the party beneficially interested. *Whately v. Strobe*, 12 Cal. 98.

31. Where B sells and delivers to C certain personal property, with an agreement then made that C is to re-sell and re-deliver upon B's executing and delivering to C certain notes, and B subsequently tenders these notes and demands the property, and C refuses to take the notes or surrender the property, and the whole transaction on the part of C was a fraud, his intention being to get hold of and keep the property: *Held*, that the tender of the notes did not vest the ownership thereof in C, and that he cannot sue on them; that the fraud takes the case out of the rule that a tender of specific personal property vests the title thereto in the tenderer. *Lamott v. Butler*, 18 Cal. 32.

32. An assignment by a creditor of a portion of a debt does not make the assignee a joint owner of the whole debt, and he is not a necessary party to a suit for its recovery. *Leese v. Sherwood*, 21 Cal. 152.

33. An absolute assignment of a demand enables the assignee to sue for and recover the whole debt, even though by the assignment he acquired only a portion of the demand. *Gradwohl v. Harris*, 29 Cal. 150.

34. Where a new promise is made to the payee of a promissory note, the indorsee, to whom the note is afterwards transferred, may maintain an action upon it. He succeeds, in such cases, to the rights of the payee. Same rule holds where a new promise is relied on to obviate a discharge in insolvency. *Smith v. Richmond*, 19 Cal. 476.

35. *Bill of Lading*.—Where a suit is brought upon a bill of lading to the plaintiff jointly with another, the plaintiff has no separate cause of action. *Mayo v. Stansbury*, 3 Cal. 465.

36. *Contracts*.—Where a joint contract was made by M and C for the purchase of a quantity of flour of defendants, and the defendants delivered one portion of the flour to M and another to C on their respective orders, and received payment for the same from them severally, and settled with C, and then cancelled the contract with regard to him, and M afterwards sued for damages alleged to have been sustained by him alone on the contract: *Held*, that if plaintiff relied upon the original contract between him and C, and the defendants, he could not sue without joining C in the action. *McGivery v. Moorhead*, 3 Cal. 267.

37. Where T and C executed a joint lease to L to certain premises, and it was specified in the lease that twenty dollars rent should be paid to T and twenty dollars to C, and on breach of the terms of the lease on the part of the lessee, T and C, the lessors, brought a joint suit to recover the rent and restitution of the premises: *Held*, that there was no misjoinder of parties plaintiff. *Treat and Flower v. Liddell*, 10 Cal. 302.

38. **Counties.**—Suit brought for or against a county shall be by or in the name of such county. Statutes of 1854, p. 194; Wood's Dig., p. 249, Art. 1377.

39. A county is a corporation, and is the proper party plaintiff to object to a contract made by the Board of Supervisors for building a jail. *Smith v. Myers*, 15 Cal. 33.

40. The people of a county are not a corporation, nor are they recognized in law as capable of suing or being sued. *Id.* 34.

41. Under the Act of April, 1854, counties have the right of prosecuting and defending actions in the same manner as individuals. *Placer County v. Astin*, 8 Cal. 305.

42. An action upon a recognizance given in a criminal case is properly commenced in the name of the county as plaintiff. *Mendocino County v. Lamar*, 30 Cal. 627.

43. Counties are quasi corporations, and can sue and be sued. *Price v. Sacramento County*, 6 Cal. 254.

44. An action against a defaulting Treasurer and his sureties for money belonging to the county of Sacramento, if the defalcation occurred after the passage of the Act of April 25, 1863, providing for the government of the county of Sacramento, is properly brought in the name of the Board of Supervisors of the county of Sacramento, instead of that of the People of the State of California. *Sacramento County v. Bird*, 31 Cal. 66.

45. If the complaint on the official bond of a County Treasurer avers that the money for which the Treasurer is in default belongs to the county, the action is properly brought in the name of the county. *Mendocino County v. Morris*, 32 Cal. 145.

46. An action may be brought in the name of a county to recover money belonging to the general fund of the county. *Solano Co. v. Nevil*, 27 Cal. 468. See the case of *Sharp v. The County of Contra Costa*, Oct. T., 1867.

47. **Counties, actions by and against.**—Hittell's Dig., paragraphs 1207, 1212. See further *ante*, No. 38.

48. **Ejectment.**—Actions of ejectment must be prosecuted in the name of the real party in interest. *Ritchie v. Dorland*, 6 Cal. 33.

49. In ejectment for common property, the action should be in the name of the husband alone. But if the wife be joined, the misjoinder is no ground of nonsuit on the trial, though it would be ground of demurrer if the defect appeared on the face of the complaint, or for motion to dismiss, as to the wife, on the trial. *Mott v. Smith*, 16 Cal. 533.

50. In this State, all the property, both real and personal, belonging to the estate of a deceased person, goes into the possession of the administrator, who is, therefore, a necessary party to all suits affecting it. *Harwood v. Marye*, 8 Cal. 580; and see further *ante*, § 6, No. 2.

51. The statute which gives the possession and control of real property belonging to intestates to their administrators, until administration of the estate and distribution of the property are had, only applies to cases arising since the statute was passed. *Soto v. Kroder*, 19 Cal. 67.

52. In this State, a plaintiff claiming as heir-at-law can recover in an action of ejectment without an entry upon the premises after the death of his ancestor. It is sufficient that he show his title as heir to the premises demanded. *Id.*

53. A tract of land was held by several tenants in common, and, on partition, a certain portion was set apart and quit-claimed to plaintiff, representing M, who had conveyed to plaintiff as security for indorsements. Another portion of the land was set apart and quit-claimed to H. The portion thus received by H was subsequently conveyed to plaintiff, and embraces the land in controversy. Held, that plaintiff is not mortgagee of the premises; that even if he held the premises conveyed by H to him as security for the indorsements of M, it was as trustee of the legal title; that the title had passed from H, and had never been in M, except of an undivided interest before the partition, and was, therefore, in plaintiff, who could maintain ejectment. *Seaward v. Malotte*, 15 Cal. 304.

54. All persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may, jointly or severally, bring or defend any civil action for the enforcement or protection of the rights of such party. Statutes of 1857, 62.

55. One tenant in common may sue a party in possession by adverse claim, and recover the premises, if plaintiff represents the better title. *Collier v. Corbett*, 15 Cal. 183.

56. Such grantee, though seized in fee of only an undivided interest in the particular parcel of land, may recover in ejectment the whole of that parcel, as against all persons except the original cotenant and his grantees. He is entitled to the possession of the entire premises as against all other parties. *Stark v. Barrett*, 15 Cal. 361; 20 Cal. 162; 21 Cal. 348.

57. A non-resident alien may doubtless maintain ejectment. *People v. Rogers*, 13 Cal. 165.

58. The heir has a right of entry upon the real estate left by his ancestor, subject only to the statutory right of the administrator; and where there is no administrator the heir can maintain ejectment. *Updegraff v. Trask*, 18 Cal. 458; *Estate of Woodworth*, 31 Cal. 604.

59. Executor, trustee, etc.—*Vide* § 6.

60. Father or mother. See § 11.

61. Foreclosure.—The question whether the plaintiff had the right to go into equity and foreclose the mortgage given to the principal to secure the note, depends upon the fact whether he was really interested in the subject matter. *Ord v. McKee*, 5 Cal. 515.

62. Where a mortgage is given to secure the separate debts of several persons as mortgagees, it is a several security, and may be enforced by each creditor, as in case of a separate mortgage. But when other parties are interested in the property, the Court will require them to be brought in before ordering a sale or foreclosure. *Tyler v. Freka Water Co.*, 14 Cal. 212.

63. Where thirteen persons made a joint and several promissory note, payable to three of their number, and all joined in the execution of a mortgage to secure the payment of the note—the plaintiffs being both payers and payees in the note, and the mortgagors and mortgagees in the mortgage—and, subsequently, the payees of the note brought suit against the other makers, and for a foreclosure of the mortgage: *Held*, that the suit was properly brought, and plaintiffs were entitled to a judgment of foreclosure. *McDowell v. Jacobs*, 10 Cal. 387.

64. Where an assignment of a note and mortgage has been made to plaintiffs to indemnify them as sureties on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them, as such assignees, to institute suit on the note and mortgage; and a decree of foreclosure in such case, with directions to pay the money into Court, to await the further decree of the Court, is proper, or at least, there is no error in such a decree to the prejudice of the defendants. *Hunter & Davis v. Levan and Wife*, 11 Cal. 11.

65. A mere stranger, who voluntarily pays money due on a mortgage, and fails to take an assignment thereof, but allows it to be cancelled and discharged, cannot afterwards come into equity, and in the absence of fraud, accident, or mistake of fact, have the mortgage reinstated, and himself substituted in the place of the mortgagee. *Guy v. Du Uprey*, 16 Cal. 195.

66. A note was executed to O, as the agent of M, and the mortgage to secure the note was made to M. O, under a contract with M, was entitled to one-half of the note: *Held*, that O having a right to the note, had a right to foreclose the mortgage. *Ord v. McKee*, 5 Cal. 516.

67. Fraud.—An action founded upon a fraud cannot be maintained by a party to the fraud. *Dupuy v. Williams*, 26 Cal. 313.

68. Indorsee.—See *ante*, assignee, No. 23.

69. Infant.—*Vide* § 9.

70. Married Woman.—*Vide* § 7.

71. **Misjoinder**, or defect of parties plaintiff. See § 40, note sub. 4.
72. **Parties plaintiff**.—See further, "Real party in interest," *ante* § 4. "Causes of action assignable." *Id.* Also § 5.
73. **Parties**.—One or more may sue for all, when.—See *post*, § 14.
74. **Party**.—Who should be joined as plaintiff, may be made a defendant, when. See *post*, § 14.
75. **Parties**.—All who are united in interest, should be made plaintiff. See *post*, § 14.
76. **Parties**.—Court to order parties brought in, when. § 17.
77. **Partners**.—Partners cannot sue one another for any of the business or undertakings of the partnership. This can only be done in chancery by asking for a dissolution and an account. *Stone v. Fouse*, 3 Cal. 292.
78. One partner cannot sue the other in an action at law. The remedy is by bill in equity for a dissolution and an account. *Barnstead v. Empire Mining Company*, 5 Cal. 299.
79. One partner cannot sue another for a partnership transaction, without praying for an account and a settlement of the partnership transactions. *Russell v. Ford*, 2 Cal. 86.
80. One partner cannot sustain an action against his copartner for the delivery of personal property belonging to the partnership. *Buckley v. Carlisle*, 2 Cal. 420.
81. **Priest**.—The position of a priest who appears to have charge of church property, coupled with an interest, seems to be nearly analogous to that of a sole corporation in England, and has power to sue as an inseparable incident to such corporation. *Santhillan v. Moses*, 1 Cal. 94.
82. **Real party in interest**, plaintiff. See further § 4 *ante*, note "Real party in interest."
83. **Recognizance**.—See *ante*, title, "Counties."
84. **Reward**.—An agreement, by one who has lost property by fire or theft, to pay a certain sum to any one who will secure the arrest and conviction of the criminal, is not a *nude pact*; but may be enforced by a person performing the service. *Ryer v. Stockwell*, 14 Cal. 154.
86. **The state**.—An action upon a duty due by an auctioneer to the State under a special statute, not being a prosecution, but a civil action for the recovery of money due the State, is properly brought in the name of the State. *State v. Poulterer*, 16 Cal. 532. In the absence of any statute, the State cannot be sued, and a judgment against her is erroneous. *The People v. Takmage*, 6 Cal. 256.
87. In an action brought to annul a patent for land sold without authority of law, the State, and persons who have a right to mine on the land under the mining laws of this State, may be joined as plaintiffs. *People v. Morrill*, 26 Cal. 352; *Wilson v. Castro*, 31 Cal. 420.
88. The Attorney-General is the only person authorized to appear for the People in the Supreme Court, and a private person cannot at his election use the name of the People to obtain redress for private wrongs. *People v. Pacheco*, 29 Cal. 210.
89. If the State has no interest in the subject matter, an information on the relation of the Attorney-General, on behalf of the State, to annul a patent cannot be sustained. *People v. Stratton*, 25 Cal. 244.
90. **Tenant in common**.—§ 1. All persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may, jointly or severally, bring or defend any civil action for the enforcement or protection of the rights of such party. Laws of 1857, p. 62.
§ 1. Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, co-partners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining

such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same. § 2. This Act shall take effect immediately on its passage. Laws of 1867-8, 158.

91. A tenant in common of lands, employed as agent by special agreement between himself and co-tenant to take charge of the land, make sales thereof at certain prices—receiving a commission of five per cent. on sales—may sue his co-tenant for the services rendered, in respect to the land, outside of selling it. *Thompson v. Salmon*, 18 Cal. 632. Actions for the diversion of the waters of ditches are in the nature of actions for the abatement of nuisance, and may be maintained by tenants in common in a joint action. *De Johnson v. Sepulveda*, 5 Cal. 151; *Parke v. Kilham*, 8 Cal. 79.

92. One of several tenants in common has a right to sue alone for his moiety. *Covilland v. Tanner*, 7 Cal. 38.

93. Tenants in common in a mine, each owning undivided interests, acquired at different times, may sue jointly to recover possession of all of their several undivided interests. *Golber v. Fett*, 30 Cal. 481.

94. Tenants in common can unite in this State by statute in an action for the possession of real property, and the executor of a deceased tenant in common can unite with the co-tenants of his testator in such actions. *Toucheard v. Keyes*, 21 Cal. 202.

95. **Trover.**—All the parties in interest should join in an action of trover. *Whitney v. Stark*, 8 Cal. 514.

96. **Trustees, etc.**—See *ante*, § 6.

§ 13. Who may be joined as defendants.

Any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.

Applicable to Justices' Courts. N. Y. Code, § 113.

1. **Construction of this section.**—The thirteenth section of the Practice Act, which provides that any person may be made defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the question involved, has no application to the action of ejectment. It refers to cases in equity. *Garner v. Marshall*, 9 Cal. 268; *Hawkins v. Richert*, 28 Cal. 534.

2. **Fictitious defendant.** See § 69.

3. **Misjoinder, or defect of parties defendant.** See § 40, sub. 4.

4. **Actions in rem.** Real estate may be made a party. *People v. Rains*, 23 Cal. 131.

5. **Actions in equity, generally.** It is not error to make the real estate a party, as in proceedings in rem, in an action to collect taxes. *Id.*

6. All persons materially interested either legally or beneficially in the subject matter of a suit in equity, which may be affected by the decree, ought to be made parties, so that there may be a complete decree which shall bind them all and prevent future litigation. *Wilson v. Castro*, 31 Cal. 420.

7. The above rule is somewhat of convenience, and will not be rigidly enforced when its observance would be attended with great inconvenience, and answer no substantially beneficial purpose. *Id.*

8. A bill in equity is not multifarious if there is a common liability in the defendants and a common interest in the plaintiffs, or if the interests of the plaintiffs are the same and the defendants have not a coextensive common

interest, but their interests are acquired under different instruments from the same source of title. *Id.*

9. **Administrator or executor or trustee of an express trust.** *Vide* § 6.

10. **Action to quiet title to land.** See *post*, § 254.

11. **Attorney at law.**—Where an attorney is charged with being a party to a fraud in obtaining a judgment for his client, in a suit brought to set aside the judgment, he may be properly joined with his client as defendant. *Crane v. Hirshfelder*, 17 Cal., 467.

12. **Bond holders**, when should be made parties. *Hutchinson v. Burr*, 12 Cal. 103; *Patterson v. Yuba County*, Id. 105.

13. **Foreclosure.**—The general rule of Courts in Equity in foreclosure suits is, that all persons materially interested should be made parties, in order that complete justice may be done and multiplicity of suits avoided. *Montgomery v. Tuttle*, 11 Cal. 307.

14. It is not absolutely essential in all cases to make subsequent incumbancers, prior to suit of foreclosure, parties to the suit. If not so made, they are not bound by the decree; but they are not necessary parties to a decree as between the mortgagor and mortgagee; and in many cases, where the value of the property is less than the mortgage, it may be unimportant to the mortgagee to make them parties, and it would be a great hardship to compel him to make them so. *Id.*

15. A mortgagor, when he has not disposed of his interest, is a necessary party to a suit for a foreclosure and sale, under the law, even though no personal claim be asserted against him. If he has parted with the estate, his grantee stands in his shoes, and possesses the same right to contest the lien, and to object to the sale. And if the grantee be not made a party, the purchaser under the decree acquires no title. *Goodenow v. Ewer*, 16 Cal. 461; *Boggs v. Hargrave*, Id. 559; *Horn v. Jones*, 28 Cal. 194.

16. A foreclosure suit, under our system, is only a proceeding for the legal determination of the existence of the lien, the ascertainment of its extent, and the subjection to sale of the estate pledged for its satisfaction. Upon the validity and extent of that lien, the owner of the estate, whether mortgagor or his grantee, has a right to be heard, and no valid decree for the sale of the estate can pass until this right has been afforded to him. *Boggs v. Hargrave*, 16 Cal. 559.

17. A subsequent purchaser of land mortgaged is a proper, if not a necessary, party to a foreclosure suit; and if the complaint be faulty, in praying to hold him as trustee of the mortgagor, on account of fraud in the purchase, such defect cannot be reached by demurrer. *De Leon v. Higuera*, 15 Cal. 483.

18. A person claiming an interest in mortgaged premises, subsequent to the mortgage, is a proper party to the foreclosure suit; but cannot be subjected to the costs of the foreclosure beyond those occasioned by his own separate defense. *Luning v. Brady*, 10 Cal. 265.

17. Where, in suit against husband and wife to foreclose a mortgage given by the husband, and also to set aside a conveyance of the property from him to her, for fraud, the inference from the language of the complaint is that the conveyance was made in the ordinary form of conveyance on purchase, and during marriage; and the wife demurs, on the ground that facts sufficient to constitute a cause of action against her are not set out, in this, to wit: that the facts and circumstances constituting the fraud are averred in general terms only; and that there is a misjoinder of parties, in making her a defendant: *Held*, first, that if she claimed the premises as her separate property by virtue of the conveyance from her husband, that circumstance was sufficient to justify plaintiff in making her defendant; second, that it was immaterial whether the conveyance to the wife was made with or without a fraudulent intent; that, in either case, it is unavailing against the mortgage, because the inference from the language of the complaint, that the conveyance was upon purchase and during marriage, and, consequently, that the property was common property, is not negatived by any averment that the property was transferred to her before marriage, or was a gift to her, or in exchange for her separate property. *Kohner v. Ashenauer*, 17 Cal. 578.

20. Where the homestead was claimed by the husband, on an action in which he was alone defendant, to foreclose a mortgage made by him alone, since marriage, neither the rights of the husband or wife could be affected by the proceedings in that case, the wife not being a party. Legal proceedings, to be conclusive against either, must embrace both. *Revalk v. Kramer*, 8 Cal. 66; *Maris v. Marsh*, 9 Id. 96.

21. A defendant in a foreclosure suit cannot object that his wife, who joined in the execution of the mortgage, is not made a co-defendant. *Powell v. Ross*, 4 Cal. 197.

22. The vendor or his assignee is not bound to know every assignee of the vendee, however many. *Truebody v. Jacobson*, 2 Cal. 269.

23. A tenant has no such absolute right, from the mere fact of his tenancy, as to require him to be a party to the foreclosure, in order to vest the legal title in the purchaser under the decree. *McDermott v. Burke*, 16 Cal. 580.

24. Only those who are beneficially interested in the claim on the estate mortgaged are necessary parties to the foreclosure of a mortgage. *Id.* 580.

25. The interest of the lessee depends for its duration—except as limited by the terms of the lease—upon the enforcement of the mortgage. So long as the mortgage remains unenforced, the lease is valid against the mortgagor, and, in this State, against the mortgagee; but with its enforcement the leasehold interest is determined, even though the lessee be not made a party to the foreclosure suit. *Id.* 580.

26. All persons interested in the premises prior to a suit brought to foreclose a mortgage, or to enforce a mechanic's lien, whether purchasers, lienholders, devisees, remainder-men, reversioners, or incumbrancers, must be made parties, otherwise their rights will not be affected. Persons who acquire interests by conveyance or incumbrance after suit brought need not be made parties. *Whitney v. Higgins*, 10 Cal. 552.

27. Where a plaintiff in an action to foreclose a mortgage against a party who has died since the service of the summons, and before judgment, asks for a decree of sale of the mortgaged premises, and if the same is not sufficient to discharge the debt, then for a judgment over against the estate, the administrator is a necessary party to the suit. *Belloc v. Rogers*, 9 Cal. 123.

29. Where property is mortgaged to secure two notes, falling due at different times, and the mortgage is foreclosed on suit upon the first on its maturity, and then, after the period for redemption has passed, but before the sheriff has executed his deed to the purchaser, the judgment on the first note is paid: *Held*, that the lien of the mortgage for the second note could not be displaced by a sale under prior incumbrances—mechanic's liens—in proceedings to which the holder of the second note was not a party. *Hoche v. Reas*, 18 Cal. 650.

30. The mortgagee takes no estate in the land mortgaged. He simply has a lien upon it for the security of his demand, which can only be enforced by a judgment for a sale of the property mortgaged, and a sale in pursuance of the judgment. The title of the grantee of mortgaged premises is not affected by a foreclosure and sale in a suit commenced after the conveyance by the mortgagor, unless the grantee is made a party of the suit. *Bludworth v. Lake*, Oct. T., 1867.

31. If the owner of land execute a mortgage on the same, which is duly recorded, and afterwards makes a conveyance of the mortgaged premises to a third party, and the mortgagee after the conveyance, without actual notice of the deed, and before it is recorded, forecloses his mortgage and obtains a decree for a sale without making the grantee in the deed a party defendant, and before the sale the deed is recorded, the purchaser of the mortgaged premises at the sheriff's sale under the decree acquires no title. *Carpentier v. Williamson et al.*, 25 Cal. 159.

32. In an action to foreclose a mortgage, all persons beneficially interested in the mortgaged property at the time of the commencement of the action, must be made parties. *Burton v. Lies*, 21 Cal. 87.

33. An action may be maintained in the District Court against an executor or administrator, to foreclose a mortgage upon real estate executed by his testator or intestate, although the debt secured by the mortgage has been presented as a claim to the executor or administrator, and allowed by him, and also by the

Probate Judge of the county, where the only object of the action is to reach the property mortgaged and subject it to sale, and have the proceeds applied to the payment of the debt secured, and a judgment is not asked against the general estate of the deceased for the debt of any part of it. *Fallon v. Butler*, 21 Cal. 24.

34. Where a promissory note and a mortgage to secure the same are executed and delivered to the same person, and the payee of the note and mortgagee indorses the note and assigns the mortgage to a third person, who brings an action on the note and to foreclose the mortgage, it is not a misjoinder of parties defendant to join as defendants the indorser and maker of the note. *Eastman v. Turman et al.*, 29 Cal. 382.

35. If the owner mortgaged his property, and afterward sold the same to a person other than the mortgagee, and the mortgage was foreclosed and property sold prior to 1851, the purchaser acquired no title if the mortgagor was the only party defendant. The grantee of the mortgagor was a necessary party defendant. *Skinner v. Buck*, 29 Cal. 253.

36. The three hundred and ninth section of the Practice Act of 1850, allowing a creditor to maintain his action to enforce a mortgage against the mortgagor alone, is to be construed as requiring the owner of the mortgaged property, at the time of the foreclosure, to be made a defendant. *Id.*

37. When the mortgagor sells the mortgaged property, after the execution of the mortgage, and before the commencement of a suit to foreclose, his grantees are necessary parties to the foreclosure suit. *Heyman v. Lovell*, 23 Cal. 106.

38. The owner of the legal title is a necessary party to the foreclosure of a mortgage. *Brooks v. Tichnor*, Oct. T. 1864.

39. Where the mortgagor of real property sells and conveys his estate to a married man, and after the death of the grantee (his wife surviving) the mortgagee seeks to foreclose, the widow is a necessary party to the action. *Burton v. Lies*, 21 Cal. 87.

40. A defendant in a foreclosure suit cannot object that his wife, who joined in the execution of the mortgage, is not made a co-defendant. *Powell v. Ross*, 4 Cal. 197.

41. Injunction.—In a bill to enjoin the issuance of bonds of the city and county of San Francisco by the Fund Commissioners, created by the Act of April 20th, 1858, for the claims approved by the Board of Examiners, it is necessary that some of the persons to whom the bonds are to be issued should be parties to the action. *Hutchinson v. Burr*, 12 Cal. 103.

42. In an action to restrain the issuance of bonds by an incorporated company, the persons to whom the bonds are to be issued are necessary parties to such action. *Patterson v. Yuba County*, 12 Cal. 105.

43. It would also be a fatal objection to a bill in equity by defendant, to set aside the patent in this case for fraud in its procurement, that Fremont, that the patentee, is not a party. He would be a necessary party to any proceeding to avoid or set aside his patent, on the ground that it was issued through fraud or misrepresentation. His rights cannot be determined or impaired in any side suit between third parties. *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279.

44. Partners.—May be sued in their firm name. See § 656, *post*.

45. Where two or three partners in a mine make a contract with a person not interested in the same, by which he becomes entitled to a share of their interests, and a like share of the profits of their interests, the two are the only necessary parties defendant in an action brought by the person they contract with, to determine his right to a share in the mine and a corresponding share of the profits on their interest. *Settembre v. Putnam*, 30 Cal. 490.

47. In an action to take an account of a mining partnership and dissolve the same, and sever the interests of the several partners, all those owning interests in the partnership are necessary parties. *Id.*

48. Trust, enforcement of.—Where the complaint charged that A. was indebted to plaintiff, and had conveyed his property to B. to be disposed of for his benefit, and had drawn an order in favor of plaintiff on B., who had ac-

cepted it, and further charged that B. had subsequently conveyed a portion of the property to A., without consideration, praying that B. be compelled to execute the trust in favor of plaintiff. *Held*, that A. was a proper and necessary party to the action. *Lucas, Turner & Co. v. Payne*, 7 Cal. 92.

49. In an action by one of several *cestuis que trust*, to declare and enforce an implied trust in relation to land, all the persons who are entitled to, or claim to be entitled to, a portion of the trust estate, are proper parties defendant. *Jenkins v. Frink*, 30 Cal. 586.

50. If a debtor assigns his property to trustees, to be by them sold, and the proceeds to be divided *pro rata* among the creditors, one creditor cannot, after the property has been converted into money, maintain an action against the trustees for an accounting and for judgment for his *pro rata* share, without making the other creditors parties, and the assignor a defendant. *McPherson v. Parker*, 30 Cal. 455.

51. If a Mexican grant of land is confirmed to a wrong person, and a patent of the United States for the same issued to a person who did not own or claim to own the grant, and had no right to the patent, the patentee will be deemed to hold the legal title in trust for the real parties in interest. *Salmon v. Symonds*, 30 Cal. 301.

52. Trustee of an express trust.—*Vide* § 6.

ACTIONS AT COMMON LAW.

53. General rules and miscellaneous decisions.—It seems that the joinder of two persons as co-defendants who have no joint interest in the subject matter of the suit, and are under no joint liability, will, unless the mistake be corrected in the Court below, be error. *Sterling v. Hanson*, 1 Cal. 478.

54. Although some of the parties may be mere accommodation grantees and fictitious depositaries of title, still they have a right to be heard at law in their own defense, before Courts of Chancery can pronounce definitely on their claims. *Knowles v. Inches*, 12 Cal. 212.

55. Where property was seized under two attachments, and it was claimed by a third party, whereupon both attaching creditors indemnified the sheriff, who went on and sold it, and paid the proceeds to the first attaching creditor, the amount not equaling his judgment, and afterwards the party claiming the property obtained judgment against the sheriff for the value of the property: *Held*, that the recourse must be had against the first attaching creditor, for whose benefit the property was sold. *Davidson v. Dallas*, 8 Cal. 227. As in that case the attaching creditors do not stand in the position of joint trespassers, the seizure of the second being subject to the first. *Id.*

57. Where parties employed architects, reputed to be skilled in their profession, to construct at a designated point on a creek, a dam, or embankment, of certain specific dimensions, capable of resisting all floods and freshets of the stream for the period of two years, and to deliver it completed by a given time, and before the embankment was completed it was broken by a sudden freshet, and a large body of water, confined by it, rushed down the channel of the stream, carrying away and destroying in its course the store of plaintiffs, with their stock of merchandise; the employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work. Plaintiffs brought suit to recover the damage sustained by them against the employers and contractors: *Held*, that the latter alone were liable. *Boswell v. Laird*, 8 Cal. 469.

58. The relation of the parties is that of independent contractors. The relation of master and servant, or superior and subordinate, did not exist between them, and therefore the doctrine *respondet superior* does not apply to the case. *Id.*

59. In an action for damages for a breach of contract, where no other person has acquired an interest in the matter in dispute, only the parties to the contract sued on should be made parties to the action. *Barber v. Cazalis*, 30 Cal. 92.

60. Administrator, executor, etc.—See *ante*, § 6.

61. Agent, when he shall not be sued.—A public officer who stands in

the relation of agent of the government, or of the public, is not personally liable upon contracts made by him as such officer, and within the scope of his legitimate duties; but this reason does not apply when neither the government nor the public in any way can be considered or held responsible for a contract made by a person, although a public officer. *Dwinelle v. Henriquez*, 1 Cal. 392.

62. Where a party makes a purchase from an innocent agent, who afterwards parts with the money of his principal, and it afterwards turns out that such purchase avails the purchaser nothing: *Held*, that no legal right of complaint will lie against the agent. *Engels v. Healy*, 5 Cal. 136.

63. If on the face of an instrument not under seal, executed by an agent, with competent authority, by signing his own name simply, it appears that the agent executed it in behalf of the principal, the principal and not the agent is bound. *Haskill v. Cornish*, 13 Cal. 45; *Id.* 221; see also, 21 Cal. 45; *Love v. S. N. L. W. & M. Co.*, 32 Cal. 654.

64. **Agent, when he may be sued.**—If an agent, in executing a contract, use terms which charge himself, he may be sued upon the instrument itself as the contracting party; but it is otherwise if the contract contains terms which bind the principal only. *Hall v. Crandall*, 29 Cal. 568.

65. **Counties.**—Counties are *quasi* corporations, and can sue and be sued. *Sec. 134. Price v. Sacramento County*, 6 Cal. 254.

66. The right to sue a county is not limited to cases of tort, malfeasance, etc., but is given in every case of account, after presentation to, and rejection by the Board of Supervisors. *Id.* See *People v. Supervisors*, 28 Cal. 431.

67. The statute providing that no person shall sue a county for any demand, unless the claim has first been presented to the Board of Supervisors, and been by them rejected, applies as well to actions arising out of tort as upon contract. *McCann v. Sierra County*, 7 Cal. 121.

68. Suits brought for or against a county shall be by or in the name of such county. *Stat. 1854, 194; Wood's Dig. 249, art. 1377.* So where the grounds of relief are based upon the abuse of power by the city corporation, its agents or servants, the parties whose action is impeached, are necessary parties. *Id.*

69. At common law an action did not lie against a county, and this was the law of this State until the eighteenth of May, 1854. The law passed May 1st, 1854, exempting the property of counties from a forced sale under execution, did not affect the obligation of plaintiff's contract with the county, for it was but an affirmation of the common law. *Gilman v. Contra Costa County*, 8 Cal. 52.

70. The people of a county are not a corporation, nor can they sue or be sued. *Smith v. Myers*, 15 Cal. 33.

71. Boards of Supervisors cannot be sued in their official character, in ordinary common law actions, for claims against the public, county or village they represent, without express statutory provision. *Hastings v. City and County of San Francisco*, 18 Cal. 49.

72. Where a Board of Supervisors consists of three members, at least two of them should be made defendants in an action brought to enjoin the Board from purchasing property for the use of the county. *Trinity County v. McCammon et al.*, 25 Cal. 119. See further § 12, No. 38.

73. **Counties.**—Actions by and against. See *Statute 1854, 194; 1863-4, 152; same, Hittell's Dig., paragraphs 1207-12.*

74. **Duelling.**—Survivor liable. *Vide, Hittell's Dig., par. 1551, et seq.*

75. **Ejectment.**—The plaintiff in ejectment may sue one or more defendants, and they may answer separately or demand separate verdicts; unless they do so, they will be concluded by a general verdict. *Winans v. Christy*, 4 Cal. 70.

76. The plaintiff may join any number of parties defendant, without regard to the extent or character of their possession, subject only to their right to answer separately and have separate verdicts. *Ritchie v. Dorland*, 6 Cal. 33.

77. When the premises are unoccupied, parties out of possession claiming title, which claim is accompanied with the exercise of acts of ownership, as inclosure, cultivation and the like, may be made defendants. *Garner v. Marshall*, 9 Cal. 268.

78. Ejectment is a possessory action, and must be brought against the occupant; it determines no rights but those of possession at the time, and it matters not who has, or claims to have, the title of the premises. *Garner v. Marshall*, 9 Cal. 268; *Burke v. Table Mountain Water Co.*, 12 Cal. 403; *Dutton v. Warshawer*, 21 Cal. 609; *Fogarty v. Sparks*, 22 Cal. 148; *Owen v. Fowler*, 24 Cal. 192; *Lyle v. Rollins*, 25 Cal. 440; *Hawkins v. Reichert*, 28 Cal. 534; *Chink v. Cohen*, 13 Cal. 623.

79. In an action of ejectment to recover an undivided interest in a mining claim, it is not necessary to make parties defendants in such action who are in possession of such claim, holding other undivided interests, and who claim no right to the interest sued for. *Waring v. Crow*, 11 Cal. 366.

80. Where several persons conspire to obtain the land of plaintiff, and in suit against them to recover the property, two of the defendants disclaim all interest therein: *Held*, to be no ground for dismissing the suit as to them, as they were proper parties, and are liable for costs. *Dupuy v. Leavenworth*, 17 Cal. 262.

81. Cases where the Court below set aside a judgment by default in ejectment, and allowed the landlords of the defendants to come in and defend. *Barrett v. Graham*, 19 Cal. 632; *Roland v. Kreyenhagen*, 18 Id. 455.

82. Where the occupant is the mere servant or employee, his occupation may be the occupation of his employer, and if so, the employer should be made the defendant in ejectment. *Hawkins v. Reichert*, 28 Cal. 534.

83. The action to recover the possession of real estate must be brought against the person who, at the commencement of the action, is the occupant, and withholds possession. *Id.*

84. If the tenant in possession is sued in ejectment, the landlord may, in cases in which his title is drawn in issue, be permitted to defend the action in the name of the tenant, but not in his own name. *Demick v. Deringer*, 32 Cal. 488.

85. When the demanded premises are in possession of a tenant, the tenant is the proper party defendant in ejectment. The landlord is not a proper party defendant, and if made so the Court will, on motion, order a nonsuit as to him. *Id.*

86. Executor, etc.—*Vide ante*, § 6.

87. Infant.—*See ante*, § 9.

88. Malicious prosecution.—An action for malicious prosecution lies against several defendants, and the gist of the action is the malicious prosecution, and probably the cause of action is complete before acquittal. *Dreux v. Dorneo*, 18 Cal. 83.

89. Married women.—*See* § 7.

90. Misjoinders of defendants.—*See post*, § 40, note sub. 4.

91. Parties.—All persons who are united in interest should be joined. *See post*, § 14.

92. One who should be joined as plaintiff may be made defendant, when. *See post*, § 14.

93. One may defend for the benefit of all, when.—*See post*, § 14.

94. Different parties to same obligation. *See* § 15.

95. Personal representative, or successor in interest, may be brought in in case of death of a party; *see post*, § 16.

96. Court to order parties to be brought in.—When. *See post*, § 17. Fictitious name, *see* § 69 *post*.

97. The State.—In the absence of any statute to that effect, the State cannot be sued, and a judgment against her is erroneous. *People v. Tuilmage*, 6 Cal. 256.

98. Tenant in common.—One or more may defend. *Laws of 1857*, p. 62; *see* § 12 *ante note*, "Tenant in Common," No. 90.

§ 14. *Parties in interest, when to be joined. When one or more may sue or defend for the whole.*

Of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all.

Applicable to Justices' Courts; N. Y. Code, § 119.

1. **Construction of this section.**—The fourteenth section of the Practice Act was intended to apply to suits in equity, and not to actions at law. *Andrews v. Mocketumne Hill Co.*, 7 Cal. 330.

2. **Generally.**—The rule requiring all persons materially interested to be made parties to a suit is dispensed with, when it is impracticable or very inconvenient, as in cases of joint associations, composed of numerous individuals. *Gorman v. Russell*, 14 Cal. 531; *Van Schmidt v. Huntington*, 1 Cal. 55.

3. When one partner sues for an injury to the partnership property, and makes his copartner a defendant for want of his consent to join as plaintiff, the recovery must be entire for the whole injury. *Query*: Whether such non-joinder of parties plaintiff is permissible. *Nightingale v. Scannell*, 6 Cal. 506. The law will not tolerate a division of a joint right of action into several actions. *Id.*

4. In an action upon a bond or written undertaking, there can be no constructive parties jointly liable with the proper obligors. *Lindsay v. Flint*, 4 Cal. 88.

5. All the parties having a part interest in the subject matter should be joined as plaintiffs, but the defect must be taken advantage of by answer or apportionment of damages, where it does not appear on the face of the complaint. *Whitney v. Stark*, 8 Cal. 514.

6. When four of the trustees of a private corporation, owning sufficient stock to control its business, conduct the business in a grossly negligent manner, systematically disregarding the by-laws, keeping no account of receipts and expenditures, failing to pay their own assessments, without any excuse: *Held*, that a stockholder may sue in equity for an account, making the corporation and said trustees alone parties—no objection being taken that all the stockholders were not parties—and the trustees will be compelled to make good any loss occasioned by their gross negligence or willful misconduct. *Neall v. Hill*, 16 Cal. 145.

§ 15. *One action may include different parties on obligations, etc.*

Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.

Applicable to Justices' Courts. N. Y. Code, § 120. See *post*, § 32; also, § 145.

1. This section is in derogation of the old rule of common law, that one or all, and not any intermediate number, may be sued. *Stearns v. Aguirre*, 6 Cal. 183; 25 Cal. 526. [In certain particulars this case is overruled by *Lewis v. Clarkin et al.*, 18 Cal. 399.]

2. In all cases of joint and several contracts, the plaintiff may elect whether he will sue the defendants severally or jointly. *Stearns v. Aguirre*, 6 Cal. 176.

3. To create a several liability, express words are necessary. *Brady v. Reynolds*, 13 Cal. 31.

4. Where a promissory note was made payable to S., and, previously to its delivery to the payee, was indorsed for the accommodation of the maker by H. and brother and defendant, upon an agreement of the indorsers with each other that each would become surety if the other would: Held, that the indorsers were guarantors, and were jointly and not severally liable in a suit by the payee, or a third person taking the note after maturity. *Id.*

5. Where a sheriff seizes goods on two attachments in behalf of different plaintiffs, and the property being claimed by a third person, the plaintiffs in the attachment suits execute to the sheriff separate indemnifying bonds, there is no joint liability between the plaintiffs to the sheriff. Each bond must be sued on as an independent obligation. *White v. Pratt*, 13 Cal. 521.

6. The common law rule, that where defendants are sued on a joint contract, recovery must be had against all or none, is modified by our Practice Act. *People v. Frisbie*, 18 Cal. 402.

7. In a suit against two on a joint assessment for taxes, judgment may be rendered against one only of the defendants, if the other be not liable. *Id.*

8. It is no misjoinder of parties defendant for the plaintiff to sue one, or any number more than one, of all the persons severally liable upon the same obligation or instrument. *People v. Love et als.*, 25 Cal. 526.

9. Under this section a plaintiff may, at his election, sue one or more, or all the persons severally liable upon the same obligation or instrument. *Id.*

10. A bond in the following form: Know all men that we, A. as principle, and B., C. and D., as sureties, are bound unto the people in the several sums affixed to our names, viz: B., in the sum of ten thousand dollars; C., in the sum of five thousand dollars; D., in the sum of three thousand dollars, etc., etc.—“for the which payment, well and truly to be made, we severally bind ourselves, our heirs,” etc.—and signed and sealed by the obligors, is held to be an instrument embracing several distinct obligations, each of which is a joint obligation of the principle and one surety, and not joint and several. *People v. Hartlen*, 21 Cal. 585.

11. Where a promissory note, and a mortgage to secure the same, are executed and delivered to the same person, and the payee of the note and mortgagee indorses the note, and assigns the mortgage to a third person, who brings an action on the note, and to foreclose the mortgage, it is not a misjoinder of parties defendant to join as defendants the indorser and makers of the note. *Eastman v. Turman*, 24 Cal. 380.

12. In cases of joint and several contracts, an administrator cannot be joined with the survivor. *Humphreys v. Crane*, 5 Cal. 173.

§ 16. *Action, when not to abate by death, marriage or other disability.*

An action shall not abate by the death, or other disability of a party; or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, or other disability of a party, the Court on motion, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original

party; or the Court may allow the person to whom the transfer is made, to be substituted in the action.

Applicable to Justices' Courts, N. Y. Code; § 121, Abb. Forma, Nos. 1167-1192.

1. **This section construed.**—The sixteenth and seventeenth sections of the Practice Act, and the seventy-second, seventy-third and seventy-fourth sections of the amendments of 1854 to the Practice Act, give a party the right to intervene in an action in case of the transfer of any interest during the pendency thereof, or where he is directly interested in the subject matter in litigation, and this can be done either before or after issue has been joined in the case. *Brooks v. Hager*, 5 Cal., 281.

2. **Generally.**—The death of the wife, after suit brought by herself and husband for the homestead, defeats a recovery by the husband, though the right to recover existed at the commencement of the suit. *Gee v. Moore*, 14 Cal. 472.

3. If, after a decree of divorce which directs a division of the common property, the husband dies, a supplemental decree after his death, without a revivor as to his heirs, directing a sale of the property and a division of the proceeds, is void as to his heirs. It is not enough that his executors are made parties in his stead. *Ewald v. Corbett*, 32 Cal. 493.

4. Where the plaintiff in an action died before trial and a subsequent order for judgment contained a recital as follows: "This action having been continued in consequence of the death of the plaintiff by his executor, Samuel Webb, and the jury having found a verdict for plaintiff, and then awarded judgment in favor of the plaintiff: *Held*, that the recital sufficiently showed a suggestion of the death of the original plaintiff and a continuance and a revival of the cause in the name of the executor. *Gregory v. Haynes*, 21 Cal. 443.

5. The continuance of the name of a deceased plaintiff instead of that of his executor in a judgment rendered after the substitution, is an error of form only, and does not make the judgment void. *Id.*

6. The death of an appellant after argument of his case upon appeal, does not constitute any ground for delaying a decision or departing from the ordinary course of procedure, except as to the entry of the judgment which may be rendered. The entry should be of a day anterior to the appellant's death. *Black v. Shaw*, 20 Cal. 68.

7. The rule is different if the death occurs previous to the argument; in that event further proceedings can only be had upon leave given after suggestion of the death is made. *Id.*

8. If the fact appears on the record that after the institution of the suit the plaintiff conveyed a portion of the land in controversy to other persons, it would be no ground for reversing the judgment. *Barstow v. Neuman*, October T., 1867.

9. If the plaintiff conveyed his entire interest pending the suit, and the fact was alleged in a supplemental answer, and truth of the fact were made to appear, it would not necessarily defeat the action. *Id.*

10. If the plaintiff has conveyed the demanded premises pending ejectment, the Court, by the consent of both the plaintiff and vendee, may, under the provisions of the Practice Act, make an order continuing in the name of the original plaintiff. *Moss v. Shear*, 30 Cal. 468.

11. If the plaintiff in ejectment transfers the demanded premises pending the action, and the Court orders the action continued in the name of the original plaintiff, he may recover judgment for both the possession and the rents and profits. *Id.*

12. The sale and transfer by the plaintiff in ejectment of the demanded premises pending the actions is a transfer of the cause of action within the meaning of the sixteenth section of the Practice Act; and the action may be continued in the name of the original plaintiff. *Id.*

13. An action brought in the joint names of husband and wife to recover the

wife's separate estate, does not abate in consequence of a divorce and the subsequent marriage of the wife with another man after the commencement of the action. *Calderwood v. Pyser*, 31 Cal. 333.

14. If, pending an action brought in the joint names of husband and wife to recover the wife's separate estate, the plaintiffs are divorced, the action may be prosecuted to a judgment in the names of the same plaintiffs, there being no objection taken to the joinder of the plaintiffs by a supplemental answer. *Id.*

15. Where a special administrator commences an action for the recovery of real property, thereby preventing the Statute of Limitations from running against the claim of the deceased, and the successor in interest of the deceased becomes by order of Court substituted as plaintiff in the action instead of the special administrator, the right conserved by the bringing of the action by the special administrator will enure to the said successor in interest. *Garrison v. Byington*, Oct. T. 1887.

§ 17. *Court, when to decide controversy, or to order other parties to be brought in.*

The Court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the Court shall order them to be brought in.

Applicable to Justices' Courts. N. Y. Code, § 122. Abb. Forms, Nos. 1195-1197.

1. This section construed.—See *ante*, § 16, No. 1.

2. A Court of equity will not permit litigation by piecemeal. The whole subject matter and all the parties should be before it, and their respective claims determined once and forever. *Wilson v. Lassen*, 5 Cal. 114.

3. It is the duty of a Court of equity, when all the parties to a controversy are before it, to adjust the rights of all, and leave nothing open for future litigation, if it can be helped. *Ord v. McKee*, 5 Cal. 515.

4. When a husband sues to recover a homestead, and the wife does not appear in the action, the Court should order her to be brought in, so that a final decree may be binding upon them. *Marks v. Marsh*, 9 Cal. 96.

5. The right to demur was given to enable the Court to carry out the provisions of the foregoing section. *Warner v. Uncle Sam*, 9 Cal. 697.

6. If a determination of the controversy cannot be had without the presence of other parties, the Court may on its own motion, under section seventeen of the Practice Act, order them to be brought in before a final disposition of the case. *Settembre v. Putnam*, 30 Cal. 490.

7. The plaintiff filed her bill to remove a cloud upon her title to land, created by her husband's deed to one of the defendants, and she joined in the bill three other defendants, one of whom had bought a portion of the land from the plaintiff and her husband, and two of whom held a mortgage upon the property executed by them. *Held*, that the latter were unnecessary parties, as the grantee in the deed, and those claiming under him, were the only parties necessary to the complete adjudication of the case. *Peralta v. Simon*, 5 Cal. 313.

TITLE II.

OF THE PLACE OF TRIAL OF CIVIL ACTION.

- SECTION 18. Actions to be tried where subject matter situated.
 19. Actions to be tried where cause of action arose.
 20. Actions to be tried where parties reside.
 21. Change of place of trial.

§ 18. *Actions to be tried where subject matter situated.*

Actions for the following causes shall be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the Court to change the place of trial, as provided in this act:

1st. For the recovery of real property, or of an estate, or interest, therein, or for the determination, in any form, of such right, or interest, and for injuries to real property.

2d. For the partition of real property.

3d. For the foreclosure of a mortgage of real property.

Provided, that where such real property is situate partly in one county and partly in another, the plaintiff may select either of said counties, and the county so selected shall be the proper county for the trial of any, or all, of such actions as are mentioned in the first, second, and third subdivisions of this section.

Amended, Stat. 1861, 494. See § § 19, 20, 21; Bancroft's Forms, Nos. 594, 595; Abb. Forms, Nos. 1205, 1212.

(1) STATUTES OF 1864, 188; HITCHELL'S DIG., PARAGRAPH 5600-5; WOOD'S DIG., ART. 1372.
An Act relative to transferring actions and proceedings from one Court to another Court. Passed May 6th, 1854.

1. If an action or proceeding is commenced or pending in a Court, as is hereinafter mentioned, and the Judge or Justice thereof is by law disqualified from acting as such, or if for any other cause the Court orders the place of trial to be changed, it shall be transferred for trial to a Court the parties may agree upon, by stipulation in writing, or made in open Court and entered in the minutes; or, if they do not so agree, then to the nearest Court where the like objection or cause for making the order does not exist, as follows:

- 1st. If in the District Court, to another District Court.
- 2d. If in a County Court, to a District Court, or some other County Court.
- 3d. If in the Probate Court, to a District Court, or some other Probate Court.
- 4th. If in a Justice's Court, to another Justice's Court in the same county.

2. When an order is made transferring an action or proceeding for trial, the Clerk of the Court, or Justice of the Peace, shall transmit the pleadings and papers thereon to the Clerk or Justice of the Court to which it has been transferred. If the transfer is made on the ground that a Judge or Justice is disqualified from acting, the cost and fees thereof, and of re-entering and filing the pleadings and papers anew, are to abide the event of the action or proceeding; in other cases they are to be paid by the party at whose instance the order is made.

3. The Court to which an action or proceeding is transferred shall have and exercise over

1.—Probate proceedings are not civil actions within the meaning of this title. *Estate of C. G. Scott*, 15 Cal. 230.

2.—Mining claims are real estate within the meaning of, and are governed by the provisions of this section. *Watts v. White*, 13 Cal. 322; 23 Cal. 506. 321

3. Where a suit for real estate is brought in the wrong county, a motion to change the venue, and not demurrer, is the proper remedy; and in such case there is no discretion in the Court, the change being matter of right. *Id.*

4. C., being one of four defendants in ejectment, moved to transfer the action to a United States Court on the ground of his alienage, and an order was made staying all proceedings until the motion could be heard. Before the hearing of the motion plaintiff dismissed the action as to C., and one other defendant, and took judgment against the other two, who had made default. C. afterwards insisted upon his motion, and filed affidavits tending to show that the defaulting defendants were occupying the premises as his tenants, and were colluding with the plaintiff. The motion was denied, and C., having appealed from that order and from the judgment: *Held*, that the denial of the motion was proper, as after C.'s dismissal it could not properly be entertained. *Reed v. Colderwood*, 22 Cal. 463.

the same the like jurisdiction as if it had been originally commenced therein, and may by order or execution enforce the judgment.

4. In an action or proceeding transferred from a Probate Court, or brought to recover the possession of lands or tenements (excepting it be in a Justice's Court), after final judgment thereon, the Clerk of the Court in which it is heard shall certify under his seal of office, and transmit to the Court from whence it is transferred, a full transcript of the proceedings and judgment. The Clerk receiving such transcript shall docket and record the judgment in the records of his Court, briefly designating it as a judgment transferred from — Court (naming the proper Court).

5. On transferring causes, the following and no other fees and costs shall be allowed to the Clerks of the Court: For transmitting the pleadings and papers of a cause, the sum of two dollars; for re-entering and filing the same pleadings and papers anew, three dollars; for certifying and remitting a transcript and judgment, when required to be done under this act, five dollars; for docketing and recording a transcript and judgment, when required to be done under this act, five dollars. The last two items may be taxed in favor of the successful party, and made a part of the judgment against the other party, or otherwise ordered paid, as the Court hearing the action or proceeding may, by its order or judgment, direct.

6. If an action or proceeding is transferred to a Justice's Court, the Justice receiving it shall three days before he proceeds to the trial thereof, unless the parties stipulate, in writing, to waive such notice, cause therein a notice in writing to be served on the parties, which notice shall inform them of the time and place of trial; in other cases, the action or proceeding shall proceed in the same manner provided for by law in such actions or proceedings.

(§ STATUTES OF 1855, §9; HITCHELL'S DIG., PARAGRAPH 5806-9; WOOD'S DIG., 250, ART. 1579. An Act to provide for certifying and removing certain cases from the Courts of this State to the United States Circuit Courts, and to remove by writ of error certain cases from the Supreme Court of this State to the Supreme Court of the United States. Passed April 20, 1855.

1. If a suit be commenced in any Court of this State against an alien, or by a citizen of this State against a citizen of another State, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the Court, and the defendant shall, at the time of entering his appearance in such a Court of this State, file a petition for the removal of the cause for trial into the next Circuit Court of the United States, or District Court of the United States, having the powers and jurisdiction of a Circuit Court, to be held in the District where the suit is pending, and offer good and sufficient surety for his entering in such Court, on the first day of its session, copies of his process against him, and also for his there appearing and entering special bail in the cause, if bail was originally requisite therein, it shall then be the duty of such Court of this State to accept the surety and proceed no further in the cause; and all subsequent proceedings which may be taken or had in such Court, in contravention of the provisions of this section, shall be void, and of no force or effect for any purpose whatsoever.

2. A final judgment or decree in any suit in the highest Court of law or equity of this State in which a decision of the suit could be had, where is drawn in question the validity of a treaty or statute thereof, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under this State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such, their validity; or where is drawn in question the construction of any clause of the Constitution of the United States, or of a treaty, or of a statute of, or commission held, under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be removed by writ of error to, and be re-examined and reversed or affirmed

§ 19. *Actions to be tried where causes of action arose.*

Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose, subject to the like power of the Court to change the place of trial :

1st. For the recovery of a penalty or forfeiture imposed by statute ; except, that when it is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offense was committed :

2d. Against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command, or in his aid, does anything touching the duties of such officer.

N. Y. Code, § 124. See post, §§ 20, 21.

1. Proceedings for a mandamus to compel the execution of a sheriff's deed to a redemptioner, after sixty days from the redemption, under section two hundred and thirty-two of the Code, can be commenced in the county where the relator resides. The provision of the statute that actions against a public officer for acts done by him in virtue of his office, etc., set forth in this section, applies only to affirmative acts of the officer, by which in the execution of process, or otherwise, he interferes with the property or right of third persons, and not to mere omissions or neglect of official duty. *McMillan v. Richards*, 9 Cal. 420.

§ 20. *Actions to be tried where parties reside.*

In all other cases, the action shall be tried in the county in which the defendants, or any of them, may reside at the com-

in the Supreme Court of the United States, in the manner prescribed by the laws of the United States; and upon the issuance and service of such writ of error, the Chief Justice, or any Judge of the Court rendering or passing the judgment or decree complained of, upon being applied to by the plaintiff in error, or his attorney, shall sign the requisite citation to the adverse party.

3. After a final judgment shall have been rendered in any suit in the highest Court of this State; if the party against whom the decision may have been given shall within ten days thereafter file notice, in writing, with the Clerk, of his intention to remove the cause by writ of error to the Supreme Court of the United States, and shall offer sufficient security, to be approved by the Judge of the Supreme Court, or any District Court of this State, for the prosecution of such writ of error, it shall be the duty of the said Court in which such final judgment was rendered, or any Judge thereof at chambers, to stay all proceedings for such time not exceeding four months, to be fixed by the said Court or Judge, as will be sufficient to enable such party to apply for and serve his writ of error in the mode prescribed by the laws of the United States, and upon the receipt of such writ of error, the Clerk of the Court in which the record may be, and to which the writ may be directed, shall make return thereto, and send up the record or a transcript, without the necessity of any other or further order or authority whatsoever.

4. If any Judge, Clerk, or other officer of any Court of this State, shall knowingly and voluntarily act in contravention of the provisions of this act, he shall be deemed guilty of a misdemeanor in office, and liable to impeachment and removal from office.

5. One of several parties, defendants to a cause pending in one of the Courts of this State, filed his affidavit for its removal to the United States District Court, on the ground that he was an alien: Held, that it must appear that the contest was between a citizen of this State and citizens of a foreign State. *Welch v. Townsend*, 4 Cal. 208; *Greely v. Townsend*, 25 Cal. 604. See further post, Nos. 41-44.

mencement of the action; or, if none of the defendants reside in the State, or, if residing in this State, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if any defendant or defendants may be about to depart from the State, such action may be tried in any county where either of the parties may reside or service be had; subject, however, to the power of the Court to change the place of trial as provided in this Act.

Amended Stat. 1858, § 2. N. Y. Code, § 125. See post, § 21.

1. **Probate proceedings not within the Act.**—Proceedings for the settlement of an estate, and matters connected therewith, are not civil actions within the meaning of this Title 2d, so as to transfer them from one county to another. *Estate of Scott*, 15 Cal. 220.

2. **Corporation, residence of.**—The principal place of business of a corporation is its residence within the meaning of that term, as used in section 20 of the Practice Act, fixing the place of trial. *Jenkins v. the California Stage Company*, 22 Cal. 537.

3. **Habeas Corpus.**—The writ of *habeas corpus* should not issue to run out of the county, unless for good cause shown, as the absence, inability or refusal to act, of the local Judge, or other reason showing that the object and reason of the law requires its issuance. *Ex parte Ellis*, 11 Cal. 225.

§ 21. Change of place of trial.

The Court may, on motion, change the place of trial in the following cases:

1st. When the county designated in the complaint is not the proper county;

2d. When there is reason to believe that an impartial trial cannot be had therein;

3d. When the convenience of witnesses and the ends of justice would be promoted by the change;

4th. When from any cause the Judge is disqualified from acting in the action.

N. Y. Code, § 126. See *ante*, § 18, note. Abb. Forms, Nos. 1205-1212. Bancroft's Forms, 594, 595.

4. The plaintiff in an action may have the place of trial changed upon a proper showing, made under the twenty-first section of the Practice Act, and it is error in the Court to refuse. *Grewell v. Walden*, 23 Cal. 165.

5. **First subdivision.**—As a matter of practice, where defendant moves to transfer the cause to the county of his residence, plaintiff may resist, by a counter motion to retain the cause on account of the convenience of witnesses, notwithstanding the residence of defendant, and then defendant can reply to the allegations as to the convenience of witnesses; or plaintiff, instead of a counter motion, may simply resist the motion of defendant, but reasonable time should be allowed defendant, if desired, to meet the matter set up in opposition to the original motion. *Loehr v. Latham*, 15 Cal. 418.

6. On application by defendant to change the place of trial on the ground of residence, the plaintiff may resist by showing that the convenience of witnesses and the ends of justice will be promoted by the retention of the cause, and the Court may, on a proper showing of such facts, refuse to change the venue. *Jenkins v. The California Stage Co.*, 22 Cal. 537.

7. Where a change of venue is asked by defendant on the ground of his residence, if the convenience of witnesses requires that the action should be retained for trial in the Court where it was commenced, the plaintiff should present that fact in opposition to the motion, and if he neglects to do so, it is doubtful whether he can afterwards apply to the Court to which it has thus been removed, to have it sent back again. *Pierson v. McCahill*, 22 Cal. 127.

8. Corporation, residence of.—The principal place of business of a corporation is its residence within the meaning of that term as used in Sec. 20, of the Practice Act, fixing the place of trial. *Jenkins v. The California Stage Co.*, 22 Cal. 537.

9. Plaintiff may resist the motion, by counter motion, on the ground of convenience to witnesses. [See Cases, under Sub. 1.]

10. Motion, how made, practice.—On motion by defendant to change the place of trial, on ground that he is sued in the county in which he does not reside, if plaintiff resist the motion because of the convenience of witnesses, the evidence as to the convenience should be as full and particular as that which is required upon application for this cause to transfer the trial to another county. The affidavit must state the names of the witnesses. *Locke v. Latham*, 15 Cal. 418.

11. The practice upon this subject being unsettled, the parties, on the return of the cause, should have an opportunity of fully presenting the merits of the motion. *Id.*

12. It will operate against the application where the affidavit of the party shows that all the witnesses of his adversary reside in the place from whence he applies to move the trial. *Sloan v. P. Smith*, 3 Cal. 410.

13. The affidavit should state the facts in such a manner as to enable the Court to draw its own inference whether or not an impartial trial could be had in the particular case. If it fail in this, it will not warrant the Court in changing the venue. *Id.*

14. The granting of time to file counter-affidavits, on a motion to change the place of trial, is a matter of discretion in the lower Court, and will not be reviewed on appeal. *Pierson v. McCahill*, 22 Cal. 127.

15. Second subdivision, prejudice, etc.—The allegations in the affidavit of the defendants, that a strong prejudice exists in San Francisco among persons likely to be called as jurors against driving cattle through the streets of the city, and against persons engaged in that business, is not sufficient to show that he cannot have a fair and impartial trial in San Francisco. They furnish no affidavits of persons acquainted with the facts, nor do they state that they have made any inquiries of the citizens on which to base such an opinion. *Fickens v. Jones et al.*, October T. 1863.

16. The granting or refusing of a change of venue by reason of the bias and prejudice of the citizens of the county, is discretionary with the Court, subject to revision only in cases of abuse. *Watson v. Whitney*, 23 Cal. 375.

17. Third subdivision, convenience of witnesses.—The affidavits show that the acts complained of were committed in the city of San Francisco, and *prima facie* the convenience of witnesses would require that the action should be tried in that county. The affidavits of both parties show that a greater number of the witnesses as to the act committed and the injury caused thereby, reside in San Francisco; and even those who reside in Sonoma county can travel to San Francisco nearly as conveniently as to the county seat of the former county. *Fickens v. Jones*, Oct. T. 1863. (Not reported).

18. Fourth subdivision.—The judge, incapacity to act, prejudice, bias, etc.—If a Judge is related to either of the parties to an action, by consanguinity or affinity within the third degree, he is disqualified from acting in

the case in any matter except in the arrangement of the calendar or regulation of the order of business. Even if no objection is made, he has no right to act, and ought of his own motion to decline to sit as Judge. In such case, an order of the Judge dismissing the action is void, on the ground of his incapacity to act. *People v. Jose Ramon de La Guerra*, 24 Cal. 73.

19. Where a Judge is incapacitated to act as such, the action should be transferred—not dismissed; an order dismissing the action would be null and void. *Burton et al. v. Covarrubias*, April T. 1865. (Not reported.)

20. The exhibition by a Judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper and reprehensible, as calculated to throw suspicion upon the judgment of the Court, and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue, on the ground that the Judge is disqualified from sitting. The law establishes a different rule for determining the qualification of Judges from that applied to jurors. *McCauley v. Weller* (Terry, C. J.), 12 Cal. 500.

21. A Judge who is related to either of the parties to an action within the third degree of consanguinity, is incompetent to try an action between them. *De La Guerra v. Burton*, 23 Cal. 592.

22. Bias or prejudice on part of the Judge constitutes no legal incapacity to sit on trial of a cause, nor is it a sufficient ground to authorize a change of place of trial. *People v. Wm. Williams*, 24 Cal. 31.

23. The fact alone, that the Judge on a previous trial of the same cause made an erroneous ruling, is no evidence of the existence of bias or prejudice in his mind. *Id.*

24. An affidavit made on application to change the place of trial, which states, "that the Judge, as the affiant is informed, and verily believes, has frequently stated that he believes the affiant guilty of the crime charged in the indictment, and has frequently expressed himself against and adversely to the affiant in connection with said charge," does not merit consideration, as it contains a mere change upon information and belief, and does not show how the information was obtained, or upon what the belief was based. *Id.*

25. When motion must be made.—The motion should be made before or at the time of filing a demurrer, where the grounds are apparent on the face of the complaint—(*Pearkes v. Freer*, 9 Cal. 642); or before, as in the answer. It comes too late after an answer to the merits. *Thoms v. Randall*, 3 Cal. 438; *Reys v. Sanford*, 5 Id. 117.

26. May be waived.—The right is one which a party may waive, either expressly or by implication. *Pearkes v. Freer*, 9 Cal. 642.

27. It is a mere privilege which may be waived. It is not matter in abatement of the writ. The privilege must be claimed by motion to change the venue at the proper time and place. *Watt v. White*, 13 Cal. 324; overruling *Vallejo v. Randall*, 5 Cal. 462.

28. An objection to the venue, if made on grounds appearing in the complaint, must be made at or before the time of filing the demurrer, or it will be deemed waived. *Pearkes v. Freer*, 9 Cal. 642.

28½. If a defendant, sued in a county where he does not reside, demurs to the complaint, and the demurrer is sustained, and he there demurs to an amended complaint before giving notice of a motion for change of venue, he waives the right to have the case tried in the county where he resides. *Jones et al. v. Frost*, 28 Cal. 245.

29. All the defendants must join, unless, etc.—The application was made by two of the defendants on the ground—first, that two of the three defendants were residents of Sonoma county, and that the other defendant, Bronson, was a mere nominal party. Second, for the convenience of witnesses. Third, that an impartial trial could not be had in San Francisco. The affidavits of the defendants, Swift and Jones, state that they are advised and believe that Bronson was made nominally a defendant, but without any intention on the part of the plaintiff to prosecute the action against him. This is denied by the plaintiff in his counter affidavit. The action is to recover damages for injuries sustained from an attack by a steer, being driven by the defendants through the

streets of San Francisco. All are charged with having committed the act which caused the injury, and the question whether any one of the defendants is not properly chargeable with the act, cannot be tried upon this motion. The defendants do not allege in their affidavit that Bronson is not equally liable with themselves, and equally participated in the commission of the act complained of. He is therefore a proper party to the action. The rule is well settled that all of the defendants must join in the application for a change of venue, or a good reason shown why they do not, otherwise it will be denied. (*Sailly v. Hutton*, 6 Wend. Rep. 508; *Legg v. Dorsheim*, 19 Wend. Rep. 700; *Welling v. Sweet*, 1 How. Pr. Rep. 156; *Limmons v. McDougal*, 2d How. Pr. Rep. 77.) As Bronson is a resident of San Francisco, the motion so far as it was founded on the ground of residence was properly denied. *Fickens v. Jones et al.*, October T., 1863. (Not reported.)

30. **Granting motion discretionary.**—The granting of a change of venue is discretionary with the Court below, subject to review only in the cases of gross abuse. *People v. Fisher*, 6 Cal. 154; *Sloan v. Smith*, 3 Cal. 410.

31. The granting or refusing of a motion to change the venue on the ground of convenience of witnesses is discretionary with the trial Court, and subject to review only in cases of abuse. *Pierson v. McCahill*, 22 Cal. 127.

32. Although the affidavit upon which the application to change the venue of an action is made may not show any legal cause for such change, still if the Court grants the application, it has acted judicially upon a matter within its cognizance, and where it was clothed with discretion, and by the order the place of trial becomes changed. *The People v. Warren T. Seaton*, 24 Cal. 78.

33. An order refusing a change of venue on the application of defendant in a criminal prosecution, will only be received in cases of gross abuse of discretion. *People v. Fisher*, 6 Cal. 154.

34. **Granting of motion, imperative, when.**—Where a suit for real estate is brought in the wrong county, a motion to change the venue, and not demurrer, is the proper remedy. And in such case, there is no discretion in the Court, the change being a matter of right. *Watts v. White*, 13 Cal. 321.

35. **Exception to the general rule.**—Where the same fraudulent debtor confesses several fraudulent judgments in several Courts, it would not be necessary for a creditor to bring a different suit in each different Court. And where there is an exception to the general rule, it is the business of the plaintiff to show in his complaint that he comes within it. *Uhlfelder v. Levy*, 9 Cal. 607.

36. **The Court will not move in the first instance.**—The Court is not bound by its own motion, to change the venue. *Vallejo v. Randall*, 5 Cal. 461; overruled so far as it conflicts with *Watts v. White*, 13 Cal. 321.

37. **Plaintiff may transmit the papers, etc.**—If the defendant procures a change of venue the plaintiff may pay the costs and transmit the papers to the county fixed as the place of trial, and have the case placed on the calendar and tried. *Brooks v. Douglass*, 32 Cal. 208.

38. **Generally.**—When two motions are pending in an action at the same time, one to change the venue, and one to dismiss, an entry of a judgment of dismissal, without any formal order denying the motion to change the venue, is a virtual denial of the same. *The People v. Jose Ramon de la Guerra*, 24 Cal. 73.

39. In making the order changing the venue, the Court acts judicially upon a matter within its own cognizance. *People v. Warren T. Seaton*, 24 Cal. 83.

40. An appeal from an order refusing to change the venue of an action, operates as a stay of all further proceedings in the case in the Court below until such an appeal is determined. *Pierson v. McCahill*, 23 Cal. 249.

41. **Removing causes to the Federal Courts.**—See note (2) to this section, ante. *Greely v. Townsend et al.*, 25 Cal. 604.

43. To authorize a transfer of an action, in which there are several defendants, from a State Court to a United States Court, under the provisions of the Judiciary Act of 1789, on the ground of the alienage of parties defendant, all

of the defendants must be within the description of the persons entitled to a transfer, and all must join in the application. *Calderwood v. Hager*, 20 Cal. 167.

44. Thus, where in an action of ejectment commenced in a State Court against several defendants, some of whom were citizens of the United States and of this State, and one of whom was an alien residing in the State, an application was made by the alien defendant for a transfer of the case to the United States Circuit Court under the provisions of said Act, which was denied: *Held*, that the denial was proper. *Id.*

45. All defendants in an action in a State Court must be aliens or citizens of another State to authorize the removal of the cause to a Federal Court for trial. *Calderwood v. Brady et al.*, 28 Cal. 97.

46. An appeal from the Supreme Court of this State to the Supreme Court of the United States is taken within ten days "after rendering the judgment" within the meaning of these terms, as used in the Act of Congress, and operates as a supersedeas, if the writ of error is sued out and lodged with the clerk and the proper security given, within ten days from the time a petition for rehearing is denied. *Magraw v. McGlynn*, 32 Cal. 287.

47. Removal from Probate to District Courts.—*Vide* Hittell's Dig., paragraphs 5718, 5992.

TITLE III.

OF THE MANNER OF COMMENCING CIVIL ACTIONS. ^{1 2}

SECTION 22. Actions, how commenced.

23. Complaint, how indorsed; when summons may issue, how signed and issued.

24. Summons, requisites of.

25. Summons, time to answer.

26. Summons, what notice to be inserted therein.

27. *Lis pendens*, filing and effect of.

28. Summons, by whom served.

29. Summons, how served.

30. Service of summons by publication, when defendant cannot be found, etc.

31. Order of publication, what to contain.

32. Action against two or more defendants, how plaintiff may proceed.

33. Proof of service, how made.

34. Certificate or affidavit of service, what to state.

35. Jurisdiction, when Court shall have acquired.

§ 22. ¹Actions, how commenced.

Civil actions in the District Courts, Superior Court of the City of San Francisco, and the County Courts, shall be com-

(1) STATUTES OF 1854, 194; WOOD'S DIGEST, 249, ART. 1877; HITTELL'S DIG., PAR. 1909-12. An Act prescribing the manner of commencing and maintaining suits by or against counties. Passed May 11th, 1854.

² Suits against a county may be commenced in any Court of that county, or in a District Court of the Judicial District in which such county is situated, in the same manner as suits

menced by the filing of a complaint with the Clerk of the Court in which the action is brought, and the issuing of a summons thereon; *provided*, that, after the filing of the complaint, a defendant in the action may appear, answer or demur, whether the summons has been issued or not, and such appearance, answer or demurrer shall be deemed a waiver of summons.

¹ Amended, Stat. 1855, 303; N. Y. Code, § 127. See *post*, § 523.

1. **Summons, waived by appearance.**—A voluntary appearance, by a defendant, gives jurisdiction of his person without the issuance of any summons. This was equally the case under the Practice Act as it stood in 1855. *Hayes v. Shattuck*, 21 Cal. 51.

2. **Service waived, by appearance.**—An appearance by attorney, at common law, and by the express letter of our statute, amounts to an acknowledgment or waiver of service. *Suydam v. Pitcher*, 4 Cal. 280.

3. **Suit, when commenced.**—Where a complaint was filed on the thirtieth day of October, 1856, and no summons was issued thereon, and an amended complaint was filed on the twenty-sixth of January, 1857, and summons issued thereon: *Held*, that the suit was not commenced until the issuing of the summons. *Green v. Jackson*, 10 Cal. 374.

4. The provision in the General Limitation Act of 1850, that the filing of the complaint shall be deemed a commencement of suit, applies to that act only, and not to the Mechanics' Lien Act. Under this latter act, to commence a suit within six months from the expiration of a credit given, a complaint must be filed and a summons issued. *Flandreau v. White*, 18 Cal. 639.

against private persons; *provided*, that suits between counties shall be commenced in a Court of competent jurisdiction, in any county not a party to such action.

2. In counties where there is a Board of Supervisors, having an acting Chairman or President of such Board, the original process and papers shall be served on such Chairman or President, in the same manner as upon private persons; when there is no such Chairman or President, they shall in like manner be served on the County Judge of the county.

3. Immediately on the service of such process, it shall be the duty of the officer so served to deliver such process, and all papers accompanying the same, to the District Attorney for such county, whose duty it shall be to defend such cause or proceeding on the part of such county until final judgment or compromise of such suit or proceeding.

4. Suits brought for or against a county shall be by or in the name of such county.

(3) STATUTES OF 1865-6, 856. Approved April 22, 1866.

SECTION 24. —Section 24 of said Act is hereby amended so as to read as follows:

SECTION 24. No person shall sue a county in any case or for any demand, unless he or she shall first present his or her claim or demand to the Board of Supervisors for allowance, and if they fail or refuse to allow the same or some part thereof, the party feeling aggrieved may sue the county, and if the party suing shall recover in the action the full amount of the account, claim or demand presented to the said Board for allowance, then the said Board shall allow the amount of the said judgment and costs as a just claim against the county. But if the party suing shall not recover in the action the full amount of the account, claim or demand presented to the said Board for allowance, and upon which the action shall have been brought, then all costs shall be recovered against him or her by the county. Where the Board of Supervisors shall, upon the examination of any claim, account or demand of any nature whatsoever presented to them for allowance, find that the amount so claimed is greater than the just amount due from the county to the party or parties presenting the same, or in whose name the same may be presented for allowance, it shall be the duty of said Board to reject such claim, and they shall not consider such claim, account or demand, or any part thereof, which shall have been twice considered by them, except to carry out the order of a Court of competent jurisdiction relative thereto; and no account or claim against a county, nor any part thereof, shall be allowed by the Board, unless such claim, itemized and properly verified, be presented to the Board within one year from the time such claim accrued. When the claims thus presented shall be rejected in whole or in part, unless the party holding the same shall, in six months after the first rejection thereof, commence his action thereupon against such county, the cause of action shall be forever barred. All claims for services and items of account of a similar nature, presented by any one of the Board of Supervisors at any session of the Board, shall be included in one account so considered by the Board, unless by consent of the Board.

5. An action will be deemed commenced, within the meaning of the twenty-first section of the Statute of Limitations, if it appears that a complaint was filed, irrespective of the issuance of summons thereon, or of the fact that the complaint was amended before summons was issued. *Allen v. Marshall*, Oct. T., 1867. *Sharp v. Maguire*, 19 Cal. 577. *Pimental v. City of San Francisco*, 21 Cal. 368.

6. The mode of commencing suits and acquiring jurisdiction of the parties, is controlled by the Practice Act, and not by the practice which prevailed at common law. *Dupuy v. Shear*, 29 Cal. 238.

7. Quere.—Whether a summons can be deemed issued, from the mere fact that one has been made out by the clerk, with an intent on the part of the complainant that it should issue within a reasonable time thereafter. *Flowers v. Downey*, Oct. Term 1865. (Not reported).

8. Appearance by mistake. See *Forbes v. Hyde*, 31 Cal. 342.

§ 23. ¹*Complaint, how indorsed; when summons may issue, how signed and issued.*

The Clerk shall indorse on the complaint, the day, month, and year, the same is filed, and at any time within one year after the filing of the same, the plaintiff may have a summons issued. The summons shall be signed by the Clerk and directed to the defendant, and be issued under the seal of the Court.

¹Amended, Stat. 1860, 298. See *ante*, § 22.

1. If the Court is authorized to direct a summons to issue after the expiration of the year, the exercise of the power rests in the legal discretion of the Court, and its action will not be set aside on appeal, unless it clearly appears that the discretion was not soundly exercised. *Dupuy v. Shear*, 29 Cal. 238.

2. Since the amendment of 1860 to the twenty-third section of the Practice Act, the Clerk is not authorized to issue a summons in an action, without an order from the Court, after the expiration of one year from the filing of the complaint. This principle applies as well to causes in which the complaint was filed before as to those in which the complaint was filed after the amendment took effect. *Id.*

3. When a plaintiff commences an action by filing a complaint and issuing summons, but makes no service on the defendant until nine years have elapsed, an order of the Court, made on defendant's motion, striking out the complaint for want of prosecution, is not such an abuse of discretion as to justify the appellate Court in reversing the order. *Id.*

§ 24. ¹*Summons, requisites of.*

The summons shall state the parties to the action, the Court in which it is brought, the county in which the complaint is filed, the cause and general nature of the action, and require the defendant to appear and answer the complaint within the time mentioned in the next section, after the service of the summons, exclusive of the day of service, or that judgment by default will be taken against him, according to

the prayer of the complaint, briefly stating the sum of money or other relief demanded in the complaint; and the Clerk shall also indorse on the summons the names of the plaintiff's attorneys.

¹Amended, Stat. 1854, 84; 1859, 39. See §§ 26, *post*; Abb. Form, No. 99-106, and notes; Bancroft's Forms, No. 613.

1. If the summons be radically defective, it will not support a judgment by default. *People v. Woodleif*, 2 Cal. 241.

2. In this case, the summons was returnable in thirty instead of forty days, and did not state that judgment by default would be taken unless the defendant appeared and answered, nor specify any amount for which judgment would be taken. *Id.*

3. The Court may allow the summons to be amended by inserting a notice to the defendant of the nature of the demand, and that unless he appear and answer within the time therein specified, judgment by default will be taken against him. *Pollock v. Hunt*, 2 Cal. 194.

4. The only object of a summons is to bring a party into Court, and if that object be obtained by the appearance and pleading of a party, there can be no injury to him. *Smith v. Curtis*, 7 Cal. 587.

5. In actions for fraud, the summons must apprise the defendant that on failure to answer, judgment will be taken against him for the fraud. A mere notice in the summons that a money judgment will be taken, will not support a judgment for fraud. *Porter v. Hermann*, 8 Cal. 619.

§ 25. *Summons, time to answer.*

The time in which the summons shall require the defendant to answer the complaint, shall be as follows:

1st. If the defendant is served within the county in which the action is brought, ten days.

2d. If the defendant is served out of the county, but in the district in which the action is brought, twenty days.

3d. In all other cases, forty days.

1. Courts will take judicial notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own Government, and of the local divisions of the country into States, counties, cities, towns, etc. *People v. Smith*, 1 Cal. 9; see note to § 24.

2. The Practice Act allows a party ten days after the service of the summons, to file his answer, if served in the county; twenty days, if out of the county, but within the judicial district; and forty days in all other cases. A non-resident of the State would come under the last clause, and be entitled to forty days after the service of the summons. *Greuell v. Henderson*, 5 Cal. 465.

3. An answer filed without leave of Court, after the time for answering has expired, but before default has been entered, is not a nullity, but at most an irregularity. *Bowers v. Dickerson*, 18 Cal. 420.

4. The Court in its discretion may strike out an answer so filed, or retain it, or permit another to be filed; but plaintiff cannot, as of right, have such answer struck out. For these purposes, defendant is not in default until his default has been actually entered in accordance with the statute. *Id.*

§ 26. *Summons, what notice to be inserted therein.*

There shall also be inserted in the summons a notice, in substance as follows :

1st. In an action arising on contract for the recovery only of money or damages, that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint.

2d. In other actions, that if the defendant fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded therein.

See *ante*, § 24; N. Y. Code, § 129.

1. Where judgment by default is entered in an action against a party for fraudulently converting money of the plaintiff, the summons must have apprised the defendant that, on failure to answer, judgment would be taken against him for the fraud. A mere notice in the summons that a money judgment would be taken, will not support a judgment for fraud. *Porter v. Hermann*, 8 Cal. 619.

§ 27. *Lis pendens, filing and effect of.*

In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer or at any time afterwards, may record with the County Recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties to and the object of the action, and a description of the property in that county affected thereby; and the defendant may also, in such notice, state the nature and extent of the relief claimed in the answer: from the time of filing for record only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby.—*Amendment approved March 2, 1872. Stat. 1871-72; Chap. 170.*

§ 27. In an action affecting the title to real property, or the right to the possession of real property, the plaintiff at the time of filing his complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may record with the County Recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties to and the object of the action, and a description of the property in that county affected thereby; and the defendant may also, in such notice, state the nature and extent of the relief claimed in the answer: from the time of filing for record only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby.—*Amendment approved March 2, 1872. Stat. 1871-72; Chap. 170.*

tion does not apply to actions of ejectment, but to proceedings in chancery, the purpose of which is to turn equitable estates into legal ones or to enforce liens upon legal estates. *Watson v. Dowling*, 26 Cal. 125.

1. The notice of *lis pendens* does not apply to the action of ejectment. It applies only to actions which operate directly upon the title. *Long v. Neville*, 29 Cal. 131.

2. The twenty-seventh section of the Practice Act, relating to the filing of a *lis pendens* does not apply to actions of ejectment, but to proceedings in chancery, the purpose of which is to turn equitable estates into legal ones, or to enforce liens upon legal estates. *Watson v. Dowling*, 26 Cal. 125.

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¹Amended, Stat. 1854, 84; 1859, 39. See §§ 26, *post*; Abb. Form, No. 99-106, and notes; Bancroft's Forms, No. 613.

1. If the summons be radically defective, it will not support a judgment by default. *People v. Woodleif*, 2 Cal. 241.

2. In this case, the summons was returnable in thirty instead of forty days, and did not state that judgment by default would be taken unless the defendant appeared and answered, nor specify any amount for which judgment would be taken. *Id.*

3. The Court may allow the summons to be amended by inserting a notice to the defendant of the nature of the demand, and that unless he appear and answer within the time therein specified, judgment by default will be taken against him. *Pollock v. Hunt*, 2 Cal. 194.

4. The only object of a summons is to bring a party into Court, and if that object be obtained by the appearance and pleading of a party, there can be no injury to him. *Smith v. Curtis*, 7 Cal. 587.

5. In actions for fraud, the summons must apprise the defendant that on failure to answer, judgment will be taken against him for the fraud. A mere notice in the summons that a money judgment will be taken, will not support a judgment for fraud. *Porter v. Hermann*, 8 Cal. 619.

§ 25. Summons, time to answer.

The time in which the summons shall require the defendant to answer

1st. If the action is

2d. If the district in

3d. In all

1. Courts within and over local divisions

2. The summons, to the county, non-resident to forty days.

3.

without leave of Court, after the time for answering has been entered, is not a nullity, but at most an error. *Henders v. Dickerson*, 18 Cal. 420.

its discretion may strike out an answer so filed, or retain it, to be filed; but plaintiff cannot, as of right, have such an answer. For these purposes, defendant is not in default until his answer is actually entered in accordance with the statute. *Id.*

and forty days in all other cases. If the summons is returnable at a date which would come under the last clause, and be entitled to the service of the summons. *Grewell v. Henderson*, 5 Cal.

§ 26. *Summons, what notice to be inserted therein.*

There shall also be inserted in the summons a notice, in substance as follows :

1st. In an action arising on contract for the recovery only of money or damages, that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint.

2d. In other actions, that if the defendant fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded therein.

See *ante*, § 24; N. Y. Code, § 129.

1. Where judgment by default is entered in an action against a party for fraudulently converting money of the plaintiff, the summons must have apprised the defendant that, on failure to answer, judgment would be taken against him for the fraud. A mere notice in the summons that a money judgment would be taken, will not support a judgment for fraud. *Porter v. Hermann*, 8 Cal. 619.

§ 27. *Lis pendens, filing and effect of.*

In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file with the Recorder of the county in which the property is situated a notice of the pendency of the action, containing the names of the parties to, and the object of, the action, and a description of the property in that county affected thereby; and the defendant may also, in such notice, state the nature and extent of the relief claimed in the answer. From the time of filing, only, shall the pendency of the action be constructive notice to a purchaser, or incumbrance of the property affected thereby.

Amended, Stat. 1862, 572; N. Y. Code, § 132. Bancroft's, Forms, 598, 599; 10th Forms, 109-112.

1. Ejectment action of *lis pendens* not necessary.—This section does not apply to actions of ejectment, but to proceedings in chancery, the purpose of which is to turn equitable estates into legal ones or to enforce liens upon legal estates. *Watson v. Dowling*, 26 Cal. 125.

2. The notice of *lis pendens* does not apply to the action of ejectment. It applies only to actions which operate directly upon the title. *Long v. Neville*, 29 Cal. 131.

3. The twenty-seventh section of the Practice Act, relating to the filing of a *lis pendens* does not apply to actions of ejectment, but to proceedings in chancery, the purpose of which is to turn equitable estates into legal ones, or to enforce liens upon legal estates. *Watson v. Dowling*, 26 Cal. 125.

4. **Generally.**—A *bona fide* purchaser of land, without notice of proceedings pending for its condemnation, at the time of purchase, no notice of *his pendens* being filed, is not affected by the proceedings. *Bensley v. Mountain Lake Water Company*, 13 Cal. 306.

5. The common law doctrine of *his pendens* does not apply to proceedings before a Board of Supervisors for condemnation of land for road purposes. *Curran v. Shattruck*, 24 Cal. 427.

6. Under our statute, the mere pendency of a suit does not charge the purchaser of the subject matter of the suit as a purchaser *pendente lite* at common law. A notice of *his pendens* must be filed or appear of record. *Head v. Fordyce*, 17 Cal. 149. Otherwise as to actions of ejectment. 26 Cal. 125.

7. Where notice of *his pendens* was not filed, plaintiff cannot successfully set up that notice, would have done no good to the purchaser, because he could make no defense, or no better defense than the vendor. The object of the notice is to give the opportunity of defense, and also to notify third persons of the litigation. *Richardson v. White*, 18 Cal. 102; *Sampson v. Ohleyer*, 22 Cal. 200; *Horn v. Jones*, 28 Cal. 194.

8. Our statute does not give any new rights to the plaintiff, but limits rights which he had before. It simply adds to the common law rule a single term, to wit: to require for constructive notice, not only a suit in equity cases but filing notice for it. *Id.*

9. Our statute (Prac. Act, sec. 27) changes the common law rule upon this subject in ejectment cases only.

10. A purchaser of real property, pending suit—a suit in equity—affecting the title to it, is not bound by the judgment, unless notice of *his pendens* be filed with the County Recorder before the purchase. *Id.*

11. The only way to charge a purchaser of property, pending a suit, with constructive notice of the suit, is by filing a notice of *his pendens* according to the statute. *Ault v. Gassaway*, 18 Cal. 205.

12. The effect of *his pendens* is to make a subsequent purchaser from the party a mere volunteer, affected by the judgment rendered, or which may be rendered in the suit in which notice is given. *Gregory v. Haynes*, 13 Cal. 594; *Curtis v. Sutter*, 15 Cal. 263; *Haynes v. Calderwood*, 23 Cal. 409.

13. **Purchasers after *his pendens* filed.**—If a *his pendens* is filed at the commencement of an action brought to set aside a deed on the ground of fraud, parties who buy of the defendant pending the litigation are bound by the decree. *Hurlburt v. Butenof*, 27 Cal. 54.

14. A person who, pending an action for the foreclosure of a mortgage, and with notice of its pendency, purchases from one of the defendants therein a portion of the mortgaged premises, occupies the same position as his grantor in reference to the issuance of a writ of assistance in favor of the purchaser under the decree. *Montgomery v. Byers*, 21 Cal. 107.

15. **Actual notice.**—A party taking an interest in land pending a foreclosure, with actual notice of the action, is bound to same extent, as if a *his pendens* is filed. *Sharp v. Lumley et al.*, Jan. T., 1868. (Not reported.)

§ 28. ¹ *Summons, by whom served.*

The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or appointed by a Judge of the Court in which the action is brought, or by any white male citizen of the United States, over twenty-one years of age, who is competent to be a witness on the trial of the action, except as hereinafter provided. A copy of the complaint, ~~certified by the clerk,~~ shall be served with the summons. When the summons is served by the sheriff or his

An Act to amend an Act entitled "An Act to regulate proceedings in civil cases in the Courts of Justice in this State," passed April 25th, 1851. The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1.—Section twenty-eight of said Act is hereby amended so as to read as follows:

§ 28.—The summons shall be served by the Sheriff of the county where the defendant is found, or by his Deputy, or by a person specially appointed by him, or appointed by a Judge of the Court in which the action is brought, or by any white male citizen of the United States, over twenty-one years of age, who is competent to be a witness on the trial of the action, except as hereinafter provided. A copy of the complaint* shall be served with summons. Where the summons is served by the Sheriff or his Deputy, it shall be returned with the certificate or affidavit of the officer of its service, and of the service of the copy of the complaint, to the office of the Clerk from which the summons issued. When the summons is served by any other person as before provided, it shall be returned to the office of the Clerk from which it issued, with the affidavit of such person of its service, and of the service of a copy of the complaint. If there be more than one defendant in the action, and such defendants reside within the county, a copy of the complaint need be served on only one of the defendants.

[Approved, April 1st, 1870.

Runs statute time.]

* The words "certified by the Clerk" are erased by this amendment.

retained at any time. *Ritter v. Scannell*, 11 Cal. 248.

8. The sheriff has no right to amend his return so as to affect vested rights. *Marshall v. Provost*, 6 Cal. 87; *Webster v. Haworth*, 8 Cal. 26.

9. Return conclusive.—His return is not traversable, nor can it be attacked collaterally, even if has been guilty of fraud or collusion. *Egery v. Buchanan*, 5 Cal. 56.

10. Returns, how made.—All returns must be made by the deputy in the name and by the authority of the sheriff. *Joyce v. Joyce*, 5 Cal. 449.

11. A summons was served by a deputy sheriff and returned with the following signature to the return: Elijah F. Cole, D. S. Judgment was rendered by default: *Held*, that the judgment was null and void; the return should have been in the name of the sheriff by the deputy. *Rowley v. Howard*, 23 Cal. 401.

12. Affidavit of Service.—The affidavit of service required by this section must show that the person serving it was a white male citizen, over twenty-one years of age, competent to testify in the cause, and that a certified copy of the complaint accompanied the summons. *McMillan and Wife v. Reynolds*, 11 Cal. 378.

§ 29. ¹ *Summons, how served.*

The summons shall be served by delivering a copy thereof, as follows:

1st. If the suit be against a corporation, to the President,

14. A person who, pending an action for the foreclosure of a mortgage, with notice of its pendency, purchases from one of the defendants therein a portion of the mortgaged premises, occupies the same position as his grantor in reference to the issuance of a writ of assistance in favor of the purchaser under the decree. *Montgomery v. Byers*, 21 Cal. 107.

15. **Actual notice.**—A party taking an interest in land pending a foreclosure, with actual notice of the action, is bound to same extent, as if a *lis pendens* is filed. *Sharp v. Lunley et al.*, Jan. T., 1868. (Not reported.)

§ 28. ¹ *Summons, by whom served.*

The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or appointed by a Judge of the Court in which the action is brought, or by any white male citizen of the United States, over twenty-one years of age, who is competent to be a witness on the trial of the action, except as hereinafter provided. A copy of the complaint, ~~certified by the clerk,~~ shall be served with the summons. When the summons is served by the sheriff or his

deputy, it shall be returned with the certificate or affidavit of the officer of its service, and of the service of the copy of the complaint, to the office of the clerk from which the summons issued. When the summons is served by any other person, as before provided, it shall be returned to the office of the clerk from which it issued, with the affidavit of such person of its service, and of the service of a copy of the complaint. If there be more than one defendant in the action, and such defendants reside within the county, a copy of the complaint need be served on only one of the defendants.

¹ Amended Stat. 1854, 42; 1855, 196; 1859, 39; 1860, 298.

1. Courts will take judicial notice of the signature of their officers, as such, but not of parties to a cause. *Alderson v. Bell*, 9 Cal. 321.

2. **Presumptions.**—Courts should presume that the sheriff served all process within his jurisdiction, where no place of service is stated. *Crane v. Brannan*, 3 Cal. 195.

3. Where he states that he served defendant with a certified copy of the complaint, it will be presumed that the copy was certified by the clerk and not by some one else. *Curtis v. Herrick*, 14 Cal. 119.

4. Where the levy is made by posting a copy of the writ on the premises, it is not necessary to show by the return that the premises were at the time unoccupied. *Bitter v. Scannell*, 11 Cal. 248; *O'Connor v. Blake*, 29 Cal. 312.

5. **Description.**—The word "appurtenances" insufficient to comprehend within its meaning any personal property as the subject of a levy. *Monroe v. Thomas*, 5 Cal. 471.

6. A description in a sheriff's return of city lots, by numbers, referring to the official map, is sufficient. *Welch v. Sullivan*, 8 Cal. 186.

7. **Amendment, mistake.**—A mistake in the date of a return may be corrected at any time. *Bitter v. Scannell*, 11 Cal. 248.

8. The sheriff has no right to amend his return so as to affect vested rights. *Newhall v. Provost*, 6 Cal. 87; *Webster v. Haworth*, 8 Cal. 26.

9. **Return conclusive.**—His return is not traversable, nor can it be attacked collaterally, even if has been guilty of fraud or collusion. *Egery v. Buchanan*, 5 Cal. 56.

10. **Returns, how made.**—All returns must be made by the deputy in the name and by the authority of the sheriff. *Joyce v. Joyce*, 5 Cal. 449.

11. A summons was served by a deputy sheriff and returned with the following signature to the return: Elijah F. Cole, D. S. Judgment was rendered by default: *Held*, that the judgment was null and void; the return should have been in the name of the sheriff by the deputy. *Rowley v. Howard*, 23 Cal. 401.

12. **Affidavit of Service.**—The affidavit of service required by this section must show that the person serving it was a white male citizen, over twenty-one years of age, competent to testify in the cause, and that a certified copy of the complaint accompanied the summons. *McMillan and Wife v. Reynolds*, 11 Cal. 378.

§ 29. ¹ *Summons, how served.*

The summons shall be served by delivering a copy thereof, as follows:

1st. If the suit be against a corporation, to the President,

or other head of the corporation, Secretary, Cashier, or Managing Agent, thereof.

2d. If the suit be against a foreign corporation, or a non-resident joint stock company, or association, doing business within this State, to an agent, cashier or secretary, thereof.

3d. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, guardian; or if there be none within the State, then to any person having the care, or control, of such minor, or with whom he resides, or in whose service he is employed.

4th. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such guardian.

5th. In all other cases, to the defendant personally.

¹Amended, Stat. 1854, 85; 1861, 496; Counties, how served, see *ante*, note to § 22; Abb. Forms, Nos. 132-135.

1. Corporations, service on.—A sheriff's return on the summons against a corporation, that he served the same on the president and secretary of the company, is *prima facie* evidence that the persons named in the return were such officers. *Rowe v. Table Mountain Water Co.*, 10 Cal. 441.

2. The return of a sheriff on a summons, that he served it on one Pendleton, one of the partners and associates of the company, is *prima facie* evidence that Pendleton was such partner and associate. *Wilson v. Spring Hill Quartz Mining Co.*, 10 Cal. 445.

3. In a suit against a corporation, the summons must be served on one of the officers or agents named in the Practice Act. *Aiken v. Quartz Rock Co.*, 6 Cal. 186.

4. Service on a party in possession of the property, who does not appear to be one of the officers named, will not entitle the plaintiff to a judgment by default. *Id.*

5. Where, in an action against an incorporated company, the return of the sheriff showed that he had served the summons in the action "upon James Street, one of the proprietors of the company:" *Held*, that it was not sufficient evidence of service to give the Court jurisdiction, it not appearing that Street was president, or head of the corporation, or secretary, cashier or managing agent thereof. *O'Brien v. Shaw's Flat and Tuolumne Canal Co.*, 10 Cal. 343.

6. Where the summons was issued against Adams & Co., and served on C. B. Macy, and nothing appeared to connect Macy with Adams & Co.: *Held*, that judgment by default could not be sustained. *Adams v. Town*, 3 Cal. 247.

7. Minor.—The requirement of the statute being positive, that in actions against a minor under the age of fourteen years, personal service of summons must be made; in cases where he resides out of this State, and his residence is known to plaintiff, such residence should be stated in the affidavit for publication. *Grey v. Palmer*, 9 Cal. 616.

8. Service of the summons upon infants, although under the age of fourteen years, should be made by depositing a summons and certified copy of the complaint in the postoffice, directed to the infant, the same as to other defendants. *Id.*

9. Personal service, how made.—Under the Practice Act, personal service of writs and process is made by delivering a copy to the party upon

whom service is required. Independent of the statutes, the mode would be by showing the original under seal of the Court, and delivering a copy. *Edmondson v. Mason*, 16 Cal. 386.

10. Service by Telegraph.—See note (1) to the next section.

§ 30. Service of Summons by publication when defendant cannot be found, etc. (1)

When the person on whom the service is to be made, resides out of the State, or has departed from the State; or cannot, after due diligence, be found within the State; or conceals himself to avoid the service of summons, and the fact shall appear by affidavit to the satisfaction of the Court, or a Judge thereof, or a County Judge, and it shall in like manner appear, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such Court or Judge may grant an order that the service be made by the publication of the summons.

N. Y. Code, § 135; Bancroft's Forms, Nos. 641-642; Abb. Forms, Nos. 113-127.

1. The sections of the Practice Act providing for the service of summons on a defendant by publication, being in derogation of the common law, must be strictly construed and pursued. *Ricketson v. Richardson*, 26 Cal. 152; *Forbes v. Hyde*, 31 Cal. 342; *People v. Huber*, 20 Cal. 81. No presumption in favor of jurisdiction will be indulged. *McMinn v. Whelan*, 27 Cal. 309.

2. Affidavit, sufficiency of.—Where the attorney of record makes an affidavit that diligent search has been made for the defendant, and that he conceals himself to avoid service of process, it is sufficient for an order for the service of summons to be made by publication. *Anderson v. Parker*, 6 Cal. 201.

3. An affidavit for an order of the publication of the summons, upon the ground of the absence of the defendant, which states that the defendant could not, after due diligence, be found in the county where the action was pending; that affiant had inquired of Fogg, who is an intimate friend of defendant, as to his whereabouts; that Fogg was unable to inform him, and that plaintiff did not know where defendant could be found within the State, is insufficient to authorize the publication. A publication made upon such an affidavit will not give the Court jurisdiction of the person of the defendant. *Swain v. Chase*, 12 Cal. 283.

4. An affidavit to obtain an order for the service of a summons by publication must show whether the residence of the person upon whom service is sought is known to the affiant, and, if known, the residence must be stated. An affidavit which merely repeats the language or substance of the statute is

Approved April 16th, 1863, 288.

Section 18. Any writ or order in any civil suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy of such writ, or order, or paper, so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner, and in the same force and effect in all respects, as the original thereof might be if delivered to him; and the officer or person serving or executing the same, shall have the same authority, and be subject to the same liabilities, as if the said copy were original. The original, when a writ or order shall also be filed in the Court from which it was issued, and a certified copy thereof shall be preserved in the telegraph office from which it was sent. In sending it either the original or certified copy may be used by the operator for that purpose.

insufficient. The ultimate facts of the statute must not be stated in the affidavit, but the probative facts, upon which the ultimate facts depend. *Ricketson v. Richardson*, 26 Cal. 152.

5. It is not sufficient to state generally in such affidavit that, after due diligence, the defendant cannot be found within the State, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party, should be stated. *Id.*

6. Before jurisdiction of a defendant can be acquired by publication of summons, it must appear by affidavit, either that the defendant resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or that he conceals himself to avoid the service of summons, and in addition thereto, it must also appear by affidavit, that a cause of action exists against the defendant, or that he is a necessary, or proper party. *Brady v. Seaman*, 30 Cal. 610.

7. An affidavit to obtain an order for the publication of summons on the ground that the defendant cannot, after due diligence, be found within the State, which does not state whether the residence of the defendant is known, and does not show that the affiant does not know where the defendant may be found, is insufficient to authorize the publication of summons. *Id.*

8. When the affidavit for publication of summons presents some evidence tending to prove each jurisdictional fact, but of a character clearly too inconclusive to justify an order of publication, the order is erroneous, and the judgment will be reversed on appeal; but it is not void. If there is a total want of evidence upon which to base the order, the judgment is void. In the former case the judgment cannot be attacked collaterally, but only on appeal. *Forbes v. Hyde*, 31 Cal. 342.

9. The existence of a cause of action against the defendant is a jurisdictional fact which must be made to appear before an order for publication of summons can be made, and if it does not appear by the affidavit, the order is void. *Id.*

10. Facts should be set out in an affidavit for an order to publish summons and not a general expression of opinion or belief that an ultimate jurisdictional fact exists, without the probative facts upon which such opinion or belief is founded. *Id.*

11. An affidavit to obtain an order for publication of summons, which states that the deponent "has a good cause of action in this suit against the said defendant, and that he is a proper party defendant thereto, as he verily believes," does not state any fact tending to show a cause of action, and an order and publication based on it are void. *Id.* *Hahn v. Kelly*, Oct. T., 1867.

12. Order, form and sufficiency of.—An order for the service of summons by publication must state the facts proved by the affidavit upon which it is based. It is not sufficient for the order to state, generally, that the defendant resides out of the State, or cannot after due diligence be found within the State, or that a cause of action exists against the defendant. *Ricketson v. Richardson*, 26 Cal. 152.

13. Where, after complaint filed and before any summons was issued, an order was obtained from the Judge that "summons do issue" and that it be published, and without any further order summons was subsequently issued and published: *Held*, that the attempt thus to acquire jurisdiction of the defendant was ineffectual, and that a judgment rendered against him by default, without any other service of process, was void. *People v. Huber*, 20 Cal. 81.

14. An order to publish a summons made in advance of the issuance of the summons, is a nullity. *Id.*

15. The Judge has no power to order a summons to issue, but only to order a summons already issued to be served in a special manner. *Id.* *McMinn v. Whelan*, 27 Cal. 304; *Forbes v. Hyde*, 31 Cal. 342.

16. The affidavits and orders referred to form no part of the judgment roll; and it is a matter of no consequence whether the jurisdiction of the Court appears affirmatively upon the judgment roll or not, for if it does not, it will

An Act concerning Service of Summons upon absent Defendants by Publication. Approved March 15, 1872.

SEC. 1. In all cases where by order of any court service of summons is directed to be made upon any absent defendant by publication, it shall be the duty of the plaintiff in such action to file in the office of the Secretary of State, within fifteen days after the making of such order, a duly certified copy of such order for publication, together with a copy of the summons in said action, and of the newspaper containing the publication thereof.

SEC. 2. For his services in filing and indexing the order, summons and newspaper in which publication is made in each action, and for issuing his certificate of the receipt and filing thereof, the plaintiff shall pay to the Secretary of State the sum of one dollar, to be paid into the State Treasury and accounted for as by law provided in the case of other fees collected in said office.

SEC. 3. The Secretary of State on receipt of the papers above mentioned, and on payment of the fee above mentioned, shall issue to the plaintiff in said action his certificate under his hand and official seal, specifying the title of the action, the court in which the same is brought, the names of the defendants as to whom publication of summons was directed to be made, and the date at which the same were filed in his office. He shall also in a book to be provided for that purpose, index the names of the defendants as to whom publication of summons was directed to be made, and note therewith the title of the action, the court in which such action is brought, the papers therein filed in his office, and the date of filing the same, and shall also endorse the date of filing upon said papers, and preserve the same in his office for reference by all persons interested therein; and the said book and said papers shall at all times be open to the gratuitous inspection of all persons applying to examine the same. Said book shall be known and referred to as the "Register of Absent Defendants."

SEC. 4. The plaintiff in such action shall file the certificate of the Secretary of State above mentioned, with the Clerk of the court in which such action is brought, together with the proof of publication of the summons therein, and service of summons by publication shall not be deemed to be complete as to any absent defendant, without the filing of said certificate as above required.

to be forthwith deposited in the Post-office directed to the person, to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State shall be equivalent to publication and deposit in the Post-office. In either case the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication. In actions upon contracts for the direct payment of money, the Court in its discretion may, instead of ordering publication, or may after publication, appoint an attorney to appear for the non-resident, absent, or concealed defendant, and conduct the proceedings on his part.

Sec. 2.—This Act shall take effect immediately.

[Approved March 29th. 1870.]

laws 1870 p. 511

based. It is not a
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13. Where, after
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14. An order to
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Wheeler, 27 Cal.

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Sec. 31. The order must direct the publication to be made in a newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the State, or absent therefrom, must not be less than two months. In case of publication where the residence of a non-resident or absent defendant is known, the Court or Judge must direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the state shall be equivalent to publication and deposit in the post-office. In either case, the service of the summons is complete at the expiration of the time prescribed by the order for publication. In actions upon contracts for the direct payment of money, the Court, in its discretion may, instead of ordering publication, or may, after publication, appoint an attorney to appear for the non-resident, absent or concealed defendant, and conduct the proceedings on his part.—Amendment approved March 2, 1872.

PUBLICATION.

[§31]

ment is collaterally attached. *Hahn* (not reported.)

7 of, how tested.—The question of for publication of summons may be an appeal supported by a statement.

ed notice.—Where the summons as original, discloses certain discrepancies sufficient that, in sense and meaning, d version of it are identical. *Sharp v.*

—When an order is made for the service ons is issued, and a supplemental commons issued thereon, the original action mented, and the Court will not acquire fendants by publication of the original ; supplemental complaint must be served 27 Cal. 309 ; *Forbes v. Hyde*, 31 Id. 342

20. How summons should be published.—If service on a defendant is attempted to be procured by publication, the summons must be published as it was when the order of publication was made. *McMinn v. Whelan*, 27 Cal. 309.

21. Order, court acts judicially in granting.—On granting the order for the publications of summons, the Court acts judicially, and can know nothing about the facts upon which the order is to be granted, except from the affidavit. *Rickson v. Richardson*, 26 Cal. 152.

§ 31. Order to direct publication.

The order shall direct the publication to be made in a newspaper, to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; provided, that publication against a defendant residing out of the State, or absent therefrom, shall not be less than three months. In case of publication, where the residence of a non-resident or absent defendant is known, the Court or Judge shall also direct a copy of the summons and complaint to be forthwith deposited in the postoffice, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint, out of the State, shall be equivalent to publication and deposit in the postoffice. In either case, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication. In actions upon contracts for the direct payment of money, the Court in its discretion may, instead of ordering publication, or may, after publication, appoint an attorney to appear for the non-resident, absent or concealed defendant, and conduct the proceedings on his part.

N. Y. Code, § 135, Bancroft's Forms, No. 642. Abb. Forms, Nos. 113-127.

1. **Attorney, appointment of.**—The provision of the Practice Act authorizing judgment, personal and final, against a defendant who concealed himself for whom the Court has appointed an attorney, with privilege to the defendant to come in and deny in six months, is not in violation of the Constitution of the United States, or that of this State. *Ware v. Robinson*, 9 Cal. 107.

2. The Court may appoint an attorney for an alleged concealed defendant, and a judgment against him will stand after six months have elapsed, unless he filed his bill to set aside the judgment on the ground of fraud, that he was not concealed. *Id.*

3. An affidavit which avers a cause of action against the defendant; that defendant cannot after due diligence be found in the State; that summons has been issued, but sheriff cannot find him; that defendant's residence is in the county where the summons issued, and that defendant still has a family residing in said county—is insufficient to authorize the Court to appoint an attorney to represent such absent defendant. *Jordan v. Giblin*, 12 Cal. 100.

4. **Publication of summons.**—A publication of summons weekly against a non-resident defendant, commencing on the 10th day of January, and ending on the 9th day of April, is a publication of three full calendar months, and the first day of the forty within which the defendant is required to answer is the 10th of April. *Savings and Loan Society v. Thompson*, 32 Cal. 347.

5. If the last day of the publication of a summons is in the same week in which the three months expires, the publication is sufficient to give the Court jurisdiction, although this day is less than three months from the first day of publication. *Id.*

6. If some of the publications of a summons, including the last, are made on Sunday, in the regular issues of the paper, it does not vitiate the service. *Id.*

7. **Month.**—The month contemplated by the statutes of this State is a calendar and not a lunar month. *Id.*

8. **Deposit in the postoffice.**—The failure to deposit in the postoffice a copy of the complaint and summons, directed to a minor, is not cured by the appearance of the mother in her own behalf. *Gray v. Palmer*, 9 Cal. 616.

9. **Forty days after publication to file answer.**—The Practice Act further provides, in relation to service on non-residents by publication, that "the service of the summons shall be deemed complete at the expiration of the time prescribed by the order of publication." *Held*, that the publication only affects the service of the summons, and the defendant is entitled to forty days after the period of publication to file his answer. *Grewell v. Henderson*, 5 Cal. 465.

10. **Generally.**—Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction. *Jordan v. Giblin*, 12 Cal. 100.

11. A judgment rendered against a party who is absent from the State, upon publication of the summons thirty days only, is void for the want of jurisdiction of the person of the defendant. *Id.*

§ 32. *Action against two or more defendants.*

Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows :

1st. If the action be against the defendants jointly indebted upon a contract, he may proceed against the defendant served, unless the Court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced

against the joint property of all, and the separate property of the defendant served; or,

2d. If the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants.

Applicable to Justices' Courts, *post*, § 635; see also § 368; N. Y. Code, 136 *see post*, § 145, "Judgments."

1. When the record shows in general terms the appearance of parties, the appearance will be confined to those parties served with process. *Chester v. Miller*, 13 Cal. 558.

2. C. purchased goods on his individual account, and directed plaintiff to charge the same to the joint account of C. and J. In an action by plaintiff: *Held*, that although J. was not liable, judgment might be rendered against C. The common law rule is modified so far, at least, as to permit judgment against a portion of the defendants whenever the contract purports on its face to be the contract of all the parties sued, and it turns out in proof that a portion only are liable. *Lewis v. Clarkin*, 18 Cal. 399; *Stearns v. Aquirre*, 6 Cal. 176—in this respect overruled; *Chester v. Miller*, 13 Cal. 558.

3. The provisions of the thirty-second section of the Practice Act, which in an action against two or more defendants all of whom are not served, authorizes judgment to be entered to bind the joint property of all the defendants, does not apply to actions for the foreclosure of mortgages on real estate. *Bowen v. May*, 12 Cal. 348.

4. A personal judgment can not be given against a party not served with process in an action on a joint obligation of several defendants. *Treat v. McCall & Brady*, 10 Cal. 511.

5. Where in an action against defendants, jointly and not severally liable, a portion of them only are served with process, the clerk cannot on the application of plaintiff enter judgment upon default against the parties served only. A judgment so entered is void. *Kelly v. Van Austin et al.*, 17 Cal. 564.

6. The proper course in such case is to enter judgment against all the defendants, but so as to be enforced against the joint property of all and the separate property of those served. *Id.*

7. Where the action is against defendants severally liable, a portion only being served with, the clerk can on application of plaintiff enter judgment upon default against the parties served without regard to the other parties named in the complaint. *Id.* [See *Bond v. Pacheco*, 30 Cal. 634 and case there cited.]

8. Where one of two defendants in a joint judgment pays it, but not with the intention of discharging it, he is entitled to use the judgment for his protection and indemnity, and may enforce it against his co-defendant for his legal proportion of the debt. *Coffee v. Tevis*, 17 Cal. 239.

9. In an action against defendants jointly indebted, where one only is served, a several judgment may be entered against them. *Huchfeld v. Franklin*, 6 Cal. 607.

§ 33. Proof of service, how made.

Proof of the service of summons shall be as follows:

1st. If served by the sheriff or his deputy, the affidavit or certificate of such sheriff or deputy; or,

2d. If by any other person, his affidavit thereof; or,

3d. In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the same; and an

affidavit of a deposit of a copy of the summons in the post-office, if the same shall have been deposited; or,

4th. The written admission of the defendant.

N. Y. Code, § 138. Bancroft's Forms, No. 643; Abb. Forms, Nos. 132-142.

1. **Parol proof of service.**—Service of summons may be proved by parol evidence. *Hahn v. Kelly*, Oct. T. 1867.

2. A return disclosing a service upon "the managing agent" of a corporation is sufficient. *Dodge v. The Mariposa Co.*, Oct. T. 1867.

3. **Return by the sheriff.**—Where, in an action against an incorporated company, the return of the sheriff showed that he had served the summons in the action "upon James Street, one of the proprietors of the company;" *Held*, that it was not sufficient evidence of service to give the Court jurisdiction, it not appearing that Street was president, or head of the corporation, or secretary, cashier or managing agent thereof. *O'Brien v. Shaw's Flat and Tuolumne Canal Co.*, 10 Cal. 343.

4. Where the return of a sheriff states that he served defendants with a certified copy of the complaint, it will be presumed that the copy was certified by the clerk, and not by some one else. *Curtis v. Herrick*, 14 Cal. 117.

5. Courts cannot know an under officer, and the act and return on a summons of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal. *Joyce v. Joyce*, 5 Cal. 449.

6. The return of a deputy sheriff, on a process served, is a nullity, unless made in the name of the sheriff. *Rowley v. Howard*, 23 Cal. 401.

7. **Return by any other person.**—The affidavit of service required by this section must show that the person serving it was a white male citizen, over twenty-one years of age, competent to testify in the cause, and that a ~~certified~~ copy of the complaint accompanied the summons. *McMillan v. Reynold*, 11 Cal. 378. See *ante*, § 28.

8. An affidavit of service of summons which states the facts constituting affiant a competent witness is sufficient, without stating that he is competent. *Dinick v. Campbell*, 31 Cal. 238.

9. The affidavit of service of summons must show affirmatively, compliance with all the requirements of the law. *McMillan and Wife v. Reynolds*, 11 Cal. 372.

10. Where an affidavit of service of summons fails to state any of the facts of competency named in the statute, it is a mere irregularity, and the judgment cannot be attacked collaterally on the ground of it. A return will give jurisdiction, even though it be false. *Peck v. Strauss*, Oct. T., 1867.

11. **Affidavit of printer, etc.**—When service of summons is had by publication, proof of the publication can only be made by the affidavit of the printer, his foreman or principal clerk; and the affidavit should state that the person taking the same holds one of these positions. An affidavit commencing in this way: "A. B., principal clerk, etc., being sworn, deposes," etc., is insufficient, and would not give the Court jurisdiction of the person of the defendant. *Steinback v. Leese*, 27 Cal. 297.

12. Where an affidavit of publication of a summons was made by a publisher and proprietor, and not by the printer, foreman or principal clerk, it was held sufficient, as being within the spirit of the statute. *Sharp v. Daugney*, Oct. T., 1867.

13. Where there is but one clerk in the office of a public newspaper, his affidavit of the publication of summons, or notice, in said paper, is sufficient, and it is unnecessary for the affidavit to describe him as principal clerk. *Gray v. Palmer*, 9 Cal. 616.

14. If the affidavit of the printer states that the summons was published one month, and yet the Court in its judgment states that it was published three, or that service had been had upon the defendant, it will be presumed that other proof than that contained in the judgment roll was made. This recital imparts absolute verity. *Hahn v. Kelly*, Oct. T., 1867.

15. **Affidavit of deposit in postoffice.**—It is not necessary that an affidavit of deposit of a copy of summons, etc., in the postoffice should state that the deposit was made by a white male citizen. The transaction at the postoffice may be proved by any one. It is unnecessary to state that the deposit was made in a United States postoffice, or that there was communication by mail between the place of deposit and the place to which the packet was addressed. *Sharp v. Daugney*, Oct. T., 1867.

16. The failure to deposit in the postoffice a copy of the complaint and summons, directed to a minor, is not cured by the appearance of the mother in her own behalf. *Gray v. Palmer*, 9 Cal. 616.

17. **Written admission of defendant.**—Courts will take judicial notice of the signatures of their officers, as such; but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signatures of the parties. In the absence of such evidence, the Court cannot notice them. *Alderson v. Bell and Wife*, 9 Cal. 315.

18. An acknowledgment of service of summons is only sufficient when reduced to writing and subscribed by the party. A verbal acknowledgment is not sufficient. *Montgomery v. Tutt*, 11 Cal. 307.

19. The statute does not require an admission of service to designate the place where the service was made. The object of such designation, when required, is to determine the period within which the answer must be filed, or when default may be taken. *Alderson v. Bell and Wife*, 9 Cal. 315.

20. Where defendant's attorneys accepted service of summons, but attached no date thereto, the date of the return by the sheriff was held to be the true date of the service. When the place where the writ is served is not stated, the Court should assume that it was served within the jurisdiction of the officer to whom it was directed. *Crane v. Brannan*, 3 Cal. 194.

§ 34. Certificate or affidavit of service, requisites of.

In case of service otherwise than by publication, the certificate or affidavit shall state the time and place of service.

N. Y. Code, § 138.

1. The only object of the designation of the place where process is served, is to determine the period within which the answer must be filed, or when default may be taken. *Whitwell v. Barbier*, 7 Cal. 62.

2. Where the evidence of the place of service is insufficient to authorize a judgment, advantage of it should be taken, either by appeal or on motion to vacate the judgment. *Pico v. Sunol*, 6 Cal. 294.

§ 35. Jurisdiction, when Court shall have acquired.

From the time of the service of the summons and copy of complaint in a civil action, the Court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant shall be equivalent to personal service of the summons upon him.

N. Y. Code, § 139. As to what constitutes an appearance, see *post*, § 523.

1. In order to give a Court jurisdiction of the subject matter, so as to enable it to issue orders or process, there must be a suit instituted in the Court. *Ex parte Cohen*, 6 Cal. 318.

2. The first point decided by any Court is, that the Court has jurisdiction, although it may not be in terms. *Clary v. Hoagland*, 6 Cal. 685.

3. The object of a summons is to bring the party into Court. If that ob-

ject be attained by the appearance and pleadings of the party, he cannot complain. *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330.

4. Where a defendant was served with process, but was not given the time allowed by statute to appear and answer, it would be a sufficient reason for the Court to quash the writ on motion by an *amicus curiæ*, or for extension of the time on defendant's motion, or a good objection on writ of error, arrest of judgment or motion for a new trial; but it cannot be said that the Court had no jurisdiction of the person, so as to render its judgment a nullity. *Whitwell v. Barbier*, 7 Cal. 62.

5. In actions in *personam* in Courts other than Admiralty Courts, no man can be deprived of his property without having been first personally cited to appear and make his defense, unless by virtue of some positive statutory enactment. *Loring v. Halsey*, 1 Cal. 29.

6. The authority of an attorney-at-law to appear for parties for whom he enters an appearance in an action, will be presumed where nothing to the contrary appears. *Hayes v. Shattuck*, 21 Cal. 51.

7. In an action upon a judgment of a Court of general jurisdiction, the defendant cannot show, as a matter of defense at law, that the Court did not acquire jurisdiction of the defendant, or that its jurisdiction was fraudulently acquired, except by examination of the record. *Carpentier v. The City of Oakland*, 30 Cal. 439.

8. A party to an action may appear in his own person or by attorney, but he cannot do both; and if he appears by attorney, he cannot assume the control of the case. *Board of Commissioners v. Younger*, 29 Cal. 147.

9. If the answer has the signature of the attorney of record, and that of an associate attorney attached to it, the Court will not strike it out. The Court will not try the question, whether the signature of the attorney of record was put there by himself or by his associate without his authority. *Wilson v. Cleveland*, 30 Cal. 192.

10. It is well settled that Courts will take judicial cognizance of the signatures of their officers as such; but there is no rule which extends such notice to the signature of the parties to a cause. *Hahn v. Kelley*, Oct. T. 1867.

11. If an attorney appears for a defendant in a Court of general jurisdiction, this appearance gives the Court jurisdiction of the person of defendant; and if the attorney appeared without authority, that fact cannot be shown, as a defense at law, in a suit upon the judgment. *Carpentier v. City of Oakland*, 30 Cal. 439.

12. If an attorney, who appears for a part only of several defendants, afterwards inadvertently files an answer for all, and, when he discovers his mistake, obtains an order allowing him to withdraw his answer, and substitute a new one limited to the defendants for whom he intended to answer, the Court will acquire jurisdiction only of those defendants for whom the attorney finally appears. *Forbes v. Hyde*, 31 Cal. 342.

13. A voluntary appearance by a defendant gives jurisdiction of his person without the issuance of any summons. This was equally the case under the Practice Act as it stood in 1855. *Hayes v. Shattuck*, 21 Cal. 51.

14. If it does not appear affirmatively upon the face of a record of a Court of general jurisdiction that the Court had jurisdiction of the defendant, that fact will be presumed, unless the record shows affirmatively that no jurisdiction was acquired. *Carpentier v. City of Oakland*, 30 Cal. 439.

TITLE IV.

OF THE PLEADINGS IN CIVIL ACTIONS.

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§ 36. *Form of pleadings.*

The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the Court.

For intervention, see § 659, etc.

§ 37. *Sufficiency of pleadings, how determined.*

All the forms of pleadings in civil actions, and the rules by

which the sufficiency of the pleadings shall be determined, shall be those prescribed in this act.

Ante, § 1; *post*, § 70; N. Y. Code, § 140.

1. Under our code of practice the same rules of pleadings govern in all cases, both at law and in equity. *Bowen v Aubrey*, 22 Cal. 566.

§ 38. *Pleadings on the part of plaintiff and defendant.*

The pleadings on the part of the plaintiff shall be the complaint or demurrer to the defendant's answer; the pleadings on the part of the defendant to the original complaint or cross complaint of a co-defendant shall be the demurrer or answer. When a defendant is entitled to relief as against the plaintiff alone, or against the plaintiff and a co-defendant, he may make a separate statement in his answer of the necessary facts, with a prayer for the relief sought, instead of bringing a distinct cross action. All pleadings subsequent to the original complaint shall be filed with the Clerk, and a copy thereof served on the adverse party or his attorney, if the adverse party or his attorney live within the county where the action is pending; *provided*, that when the answer contains a cross complaint, the parties plaintiff or defendant, or his or their attorney thereto, shall be served with a copy thereof, and shall have the same time thereafter to plead thereto that is allowed for pleading to the original complaint after service of the summons.

¹Amended Statute, 1855, 303; 1860, 298; 1863, 578; 1866, 701.

§ 39. *Complaint, what to contain.*

The complaint shall contain :

1st. The title of the action, specifying the name of the Court, and the name of the county in which the action is brought, and the name of the parties to the action, plaintiff and defendant ;

2d. A statement of the facts constituting the cause of action, in ordinary and concise language ;

3d. A demand of the relief which the plaintiff claims. If the recovery of money, or damages, be demanded, the amount thereof shall be stated.

N. Y. Code, § 142.

1. Subdivision First.—Parties to a complaint.—See *ante*, §§ 1-17.

2. Place of trial.—See *ante*, §§ 18-21.

3. Subdivision second.—Statement of facts constituting a cause of action; general rules.

4 The statute requiring the complaint to contain a statement of the facts constituting a cause of action, in ordinary and concise language, is only declaratory of the common law. *Goodwin v. Stebbins*, 2 Cal. 103.

5. The Practice Act has abolished all distinctions in the form of actions, and requires only a simple statement of the facts constituting the cause of action or defense. *Piercy v. Sabin*, 10 Cal. 27.

6. It governs all cases of pleading, legal and equitable, by the same rules—evidence included. *Goodwin v. Hammond*, 13 Cal. 169; *Riddle v. Baker*, Id. 383; *Payne v. Treadwell*, 16 Id. 243.

7. Equity.—The old rules of chancery pleading are superseded by the Practice Act. *Cordier v. Schloss*, 12 Cal. 147.

8. It is a cardinal rule in equity, as in all other pleading, that the *allegata* and *probata* must agree, and averments material to the case omitted from the pleading cannot be supplied by the evidence. *Green v. Covillaud*, 10 Cal. 317.

9. Where the complaint, in an action of trespass, asks also for the equitable interposition of the Court, if the law and equity are inseparably mixed together, it would be demurrable. *Gates v. Kieff*, 7 Cal. 124.

10. But it is not necessary that there should be express words, showing where the declaration in trespass leaves off and the bill in equity begins. *Id.*

11. It makes no distinction between the rules of pleading applicable to natural persons, and those applicable to artificial persons. *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 467.

12. The word "person," in its legal signification, is a generic term, and was intended to include artificial as well as natural. *Douglass v. Pacific M. S. S. Co.*, 4 Cal. 304.

13. Under our practice, whichever ground of recovery the pleader adopts, his complaint must contain the same allegations of fact as were required at common law. *Miller v. Van Tassel*, 24 Cal. 463.

14. Material averment, test of.—See *post*, § 66.

15. Facts alone must be stated.—Facts only must be stated. This means the facts as contradistinguished from the law, from argument, from hypothesis, and from the evidence of the facts. *Green v. Palmer*, 15 Cal. 413; 1 Cal. 359.

16. The facts must be carefully distinguished from the evidence of the facts. *Id.*

17. A pleader must insert in his pleading: first, whatever he is to prove; second, he must insert no affirmative allegation which he is not to prove; and third, that what he does insert must be decisive of some part of the cause one way or the other. *Id.*

18. All statements must be concisely made, and, when once made, must not be repeated. *Id.*

19. An occurrence should be set forth in its logical, that is, in its natural order. *Id.*

20. Only such facts as are to be proved should be stated.—Those facts, and those only, must be stated which constitute the cause of action, the defense or the reply; therefore, each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. *Green v. Palmer*, 15 Cal. 413; *Racouillat v. Rene*, 32 Cal. 455; *Willson v. Cleveland*, 30 Cal. 192.

21. Only such facts need be alleged as are required to be proved, except to negative a possible performance of the obligation which is the basis of the action, or to negative an inference from an act which is, in itself, indifferent. *Payne v. Treadwell*, 16 Cal. 220.

22. Every fact which, if controverted, plaintiff must prove to maintain his action, must be stated in the complaint. *Jerome v. Stebbins*, 14 Cal. 457.

23. It was the intention of the Code to require the pleadings to be so framed

as not only to apprise the parties of the facts to be proved by them respectively, but to narrow the proofs on the trial. *Piercy v. Sabin*, 10 Cal. 22.

24. He must allege nothing affirmatively which he is not required to prove. *Green v. Palmer*, 15 Cal. 413. It must be recollected that every fact essential to the claim of defense should be stated. If this part of the rule be violated, the adverse party may demur. *Id.*

25. Nothing should be stated which is not essential to the claim or defense, or, in other words, that none but issuable facts should be stated. If this part of the rule be violated, the adverse party may move to strike out the unnecessary parts. *Id.*

26. The title of the plaintiff is the ultimate fact, the fact in issue, upon which a recovery must be had in ejectment. The facts established by the plaintiff, going to support his alleged title, are probative facts, which, if disputed by the defendant, are facts in controversy. *Marshall v. Shafter*, 32 Cal. 176.

27. In pleading, it is the ultimate and not the probative facts which should be averred; and it is error in the Court to exclude evidence offered to establish the probative facts, although they are not averred in the complaint. *Grewell v. Walden*, 23 Cal. 165; *Miles v. McDermott*, 31 Cal. 271.

28. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged; and must allege nothing affirmatively which he is not required to prove. Negative allegations, however, are frequently necessary, though they are not to be proved. *Green v. Palmer*, 15 Cal. 411.

29. Negative allegations frequently necessary.—Negative allegations, however, are frequently necessary, though they are not to be proved. *Green v. Palmer*, 15 Cal. 411.

30. Only such facts need be alleged as are required to be proved, except to negative a possible performance of the obligation, which is the basis of the action, or to negative an inference from an act which is in itself indifferent. *Payne v. Treadwell*, 16 Cal. 220.

31. Facts, how stated.—Facts must be stated in unequivocal language, and not left to inference. *Moore v. Besse*, 30 Cal. 570.

32. A complaint should allege a material fact by direct averment, and not by inference. *Stringer v. Davis*, 30 Cal. 318.

33. Allegations by way of recital, are improper. *Shafer v. Bear River*, 4 Cal. 294. *Denver v. Burton*, 28 Cal. 549. *Stringer v. Davis*, 30 Cal. 318.

34. What ought not to be stated.

35. A legal inference or conclusion from the facts. *Green v. Palmer*, 15 Cal. 413.

36. Argument in a pleading. *Id.*

37. Hypothetical statements. *Id.*

38. The defendant's pretenses. *Id.*

39. A discharge in insolvency. *Smith v. Richmond*, 19 Cal. 476.

40. A new promise. *Id.*

41. The former is a matter of defense, to be set up by the defendant; and the latter is a matter of replication, either by way of plea or evidence, as the system of pleading may be. *Id.*

42. Conclusions of law are improper.—The facts from which the conclusion is to be drawn must be stated, not the conclusion of law. *Levinson v. Schwartz*, 22 Cal. 229.

43. "Wrongful or unlawful" conclusions of law. *Payne & Dewey v. Treadwell*, 16 Cal. 220.

44. An allegation that the plaintiff is the "owner and holder of a note is a conclusion of law. *Wedderspoon v. Rogers*, 32 Cal. 569; *Poorman v. Mills*, April T., 1868.

45. An allegation that a certain amount is due upon a note is a conclusion of law. *Frisch v. Caler*, 21 Cal. 71.

46. The promise to pay, alleged in the common Court in assumpsit, is a conclusion of law. *Wilkins v. Stidgers*, 22 Cal. 232.

47. An allegation in an answer, that certain goods were sold on a credit

which had not expired, is a conclusion of law. *Levinson v. Shwartz*, 22 Cal. 229.

48. An answer which avers "that any right that plaintiffs may have ever had to the possession," etc., they forfeited by a non-compliance with the rules, customs and regulations of the miners of the diggings embracing the claims in dispute, prior to the defendant's entry, is the averment of a legal conclusion. *Dutch Flat Co. v. Mooney*, 12 Cal. 534.

49. To aver that a "location was duly and properly made, according to the provisions of an act," is insufficient; the conditions of the act, and the performance thereof, must be specially averred. *People v. Jackson et al.*, 24 Cal. 632.

50. An averment in a complaint, that an *Ayuntamiento* had full power and lawful authority to do a particular act, is an averment of a conclusion of law, and does not tender an issue of fact. *Branham et al. v. Mayor and Common Council of San Jose et als.*, 24 Cal. 602.

51. Facts anticipating a defense ought not to be stated.—The only object to be gained by a plaintiff in anticipating a defense, and replying to it in advance, is to put the adverse party upon his oath without making him a witness, and the effect of allowing this would be to establish a system of discovery in conflict with the spirit of the statute. *Canfield v. Tobias*, 21 Cal. 349.

52. Evidence should not be alleged in a complaint.—*Racouillat v. Rene*, 32 Cal. 450; *Deputy v. Williams*, 26 Cal. 313. Probative facts should not be alleged. *Marshall v. Shafter*, 32 Cal. 176; *Geewell v. Walden*, 23 Cal. 165; *Miles v. McDermott*, 31 Cal. 271.

53. Surplusage.—"Duly," "wrongfully," and "unlawfully," when surplusage.

54. Surplus words in pleading. The words "duly," "wrongfully," and "unlawfully," when used in connection with issuable facts, while they do not vitiate a pleading, are surplusage, and had better be omitted. *Miles v. McDermott*, 31 Cal. 271; *Halleck v. Mizer*, 16 Cal. 574. See post, §§ 50, 57.

55. Tender, Averment of.—Where a party contracts for a quantity of wheat, to be delivered on demand, and paid for on delivery, in an action for non-delivery, it is unnecessary for plaintiff to aver and prove a tender of the purchase money at the time of demand or before suit. *Crosby v. Watkins*, 12 Cal. 85.

56. Demand, averment of.—A complaint, alleging that the defendant sold to plaintiffs a certain share of fruit growing in an orchard, and after the sale executed a guaranty that the share of plaintiffs should be at their disposal, and further alleging a demand for the same and the refusal of the defendant to deliver, is demurrable, as it should have contained an assignment of the breach of the contract or guaranty. *Dabovich v. Emeric*, 7 Cal. 209.

57. The true point at issue is, whether the defendant undertook to deliver. From the nature of the sale it operated as a delivery. There was no necessity of a demand on defendant, unless for the purpose of enabling him to comply with his guaranty. *Id.*

58. In an action to compel defendant to execute a deed of real estate held by him, the complaint alleged that the property was purchased by plaintiff of one C., and by agreement with defendant was conveyed directly to him as security for a debt, he to make a deed to plaintiff upon its payment, and that the debt was subsequently paid and the deed demanded; but the complaint failed to aver that defendant upon the demand, or at any other time, has refused to execute the deed: *Held*, that the failure to aver refusal is fatal to the action, and may be taken advantage of on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Dodge v. Clark*, 17 Cal. 586. See post, No. 86.

59. Breach, how stated.—A complaint for breach of a contract must state a breach in unequivocal language. *Moore v. Besse*, 30 Cal. 570.

60. Defective allegations, where cured.—*Vide* verdict § 174, No. 26; default § 150, No. 27.

61. **Records and papers, how made a part of a pleading.**—Records and papers cannot be made a part of a pleading by merely referring to them, and praying that they may be taken as a part of such pleading, without annexing the originals or copies as exhibits, or incorporating them with the answer, so as to form a part of the record in the cause. *People v. De la Guerra*, 24 Cal. 78.

62. In an action of foreclosure, where the complaint has a copy of the mortgage annexed, and to which it refers, a correct description of the land in the mortgage is sufficient for the purpose of the suit. *Emeric v. James*, 6 Cal. 155.

63. **When pleadings may be read to the jury.**—Though a pleading is not strictly proof for the party making it, still a complaint may be read to the jury to show what allegations are not denied, and hence admitted. *Garfield v. Knight's Ferry & Water Co.*, 14 Cal. 35.

64. Defendant can protect himself against any improper effect of this, by asking of the Court directions, limiting the effect to a particular purpose. *Id.*

65. **Complaint, sufficiency of.**—See further, § 40, note to sixth subdivision, also § 64.

66. **Verification.**—See *post*, §§ 51, 52, 55.

67. **Supplemental complaint.**—Where a simple contract creditor filed a bill against the assignee of his debtor, not attacking the assignment and merely praying for a distribution; and the plaintiff subsequently filed a supplemental bill, setting forth that in the meantime he had become a judgment creditor, and attacking the assignment for fraud, since discovered, and praying that it be set aside, and that the moneys in the hands of the assignee be appropriated to plaintiff's judgment: *Held*, that it is no objection to the supplemental bill, that it prays for a different relief, and fails to bring in all the other creditors, who are alleged by the defense to be entitled to a rateable distribution. *Baker v. Bartol*, 5 Cal. 483.

68. The gravamen of both bills is the indebtedness, and every supplemental bill is enlarged or altered by every additional and pertinent fact, and the plaintiff has the right to attack the assignment for fraud discovered since filing his original bill. *Id.*

Supplemental complaint. See § 67, *post*; also § 68, No. 89; also § 7, No. 13.

69. **Gross complaint.**—See § 48, *post*, No. 178.

70. **Written instrument.**—when deemed admitted, see *post*, § 53.

71. **Items of account.**—Not necessary to be set forth, see *post*, § 56.

72. **Real actions, land, how described.**—See *post*, § 58.

73. **Judgments, how pleaded,** see *post*, § 59.

74. **Conditions precedent, how pleaded,** see *post*, § 60.

75. **Private statutes, how pleaded,** see *post*, § 61.

76. **Libel and slander, how pleaded.**—See *post*, § 62.

77. **Joinder of causes of action.**—See *post*, § 64.

78. **Allegations not denied deemed true.**—See *post*, § 65.

79. **Material allegation, what is.**—See *post*, § 66.

80. **Complaint may be amended.**—See *post*, § 67.

81. **Fictitious name.**—See *post*, § 69.

82. **Pleadings, how construed.**—See *post*, § 70.

83. **Errors and defects to be disregarded, when.**—See *post*, § 71.

84. **Decisions and rules, applicable to particular subjects and persons, causes or forms of action, viz:**

85. **Account.**—The complaint in this case alleging that plaintiff and defendant are members of a joint stock company, known as the "Miner's

Ditch Company;" that defendants exclude plaintiff from participation in the business or benefit from it; that they have received large sums of money from the same, and refuse to account or pay him anything, etc., entitles plaintiff to a relief by a decree affirming his interest, and directing an account. *Smith v. Fagan*, 17 Cal. 178.

86. In an action against an agent for not accounting, etc., a request to account and pay over must be alleged in the complaint, and proved at the trial. *Bushnell v. McCauley*, 7 Cal. 421.

87. A complaint in an action for an accounting, touching the affairs, rents and proceeds of a water ditch, and for a sale of the property and a division of the proceeds, which first avers in general terms a copartnership between plaintiff and defendants in the ditch, without averring any partnership agreement, and then states that plaintiff acquired his interest in the ditch by the purchase of an undivided interest from other persons than defendants, does not state facts sufficient to constitute a cause of action, either for a dissolution and settlement of the affairs of a partnership, or for a partition. *Bradley et al. v. Clarkson*, 26 Cal. 69.

88. Account, items of.—Need not be set forth. See post, § 56.

89. Arrest.—To authorize an arrest of the defendant upon execution issued upon a judgment recovered in an action upon contract, the fraud for which the arrest is sought must be alleged in the complaint, and be passed upon by the jury, and be stated in the judgment. *Davis v. Robinson*, 10 Cal. 411.

90. When the circumstances authorizing an arrest occur subsequently to the filing of the complaint, application should be made to the Court either to amend the original or to file a supplemental complaint, so as to set forth the facts upon which execution against the person of the defendant will be asked in the enforcement of the judgment sought. *Id.*

91. A complaint alleging that the defendant collected and received certain money as the agent or attorney in fact of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of a fraud, and for judgment and execution against his person and property, is insufficient in this disjunctive form to sustain a verdict convicting the defendant of fraud. *Porter v. Hermann*, 8 Cal. 623.

92. The complaint should state the facts that constitute the fiduciary character, as well as its nature and extent. *Id.*

93. It is necessary in such a case to charge, not only that defendant received the money as agent, but that he converted it in the course of his employment as such. *Id.*

94. Where the character or capacity in which a party is alleged to have acted is essential to the charge of fraud, that character or capacity must be averred in direct and positive terms, or the charge must fall. *Id.*

95. Where the complaint was not filed until two days after an order of arrest had issued thereupon: *Held*, that the order of arrest was void. *Ex parte Cohen*, 6 Cal. 318.

96. Common counts.—The common counts cannot be united in one count as one cause of action, without any specification of the sums due upon each several cause. *Buckingham v. Waters*, 14 Cal. 146.

97. The promise to pay alleged in the common Count in assumpsit, was a mere conclusion of law from the facts stated, and need not be averred under the new code, which requires only the facts to be stated. *Wilkins v. Stedger*, 22 Cal. 232.

98. After an admission of the indebtedness charged in a complaint in assumpsit, a denial of the alleged promise to pay is immaterial. From the indebtedness admitted the law implies a promise to pay, and the denial of any express promise raises no issue that requires proof on the part of the plaintiff. *Levinson v. Schwartz*, 22 Cal. 229.

99. A count in a complaint in the old form of assumpsit for money had and received, in which the promise is laid of a day more than two years prior to the commencement of the action, is demurrable on the ground that it shows the demand to be barred by the Statute of Limitations. *Keller v. Hicks*, 22 Cal. 457.

100. **Goods sold and delivered.**—The failure to state the amounts due, severally, for goods and for money, would be fatal, just as such an averment is insufficient in an ordinary complaint. *Cordier v. Schloss*, 18 Cal. 576.

101. A count, in the ordinary form of counts in *indebitatus assumpsit*, for goods sold and delivered, and money paid and expended, is sufficient, under our system of practice. If the allegations are deemed too general, the defendant can apply for and obtain an order upon the plaintiff to furnish a bill of particulars. *Freeborn v. Glaser*, 10 Cal. 337.

102. A declaration is insufficient which alleges an indebtedness and sets forth an account, but does not allege the sale or delivery of the articles to the defendant, nor show in what place or what manner the indebtedness accrued, whether on account of the defendant or that of another. *Mershon v. Randall*, 4 Cal. 324.

103. A declaration setting forth that plaintiff had purchased a quantity of goods from W. & P., "then and there acting as the agents of defendant," is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer. *Cochran v. Goodman*, 3 Cal. 244.

104. A complaint for goods sold, which avers that the defendant is indebted to the plaintiff in a certain sum for goods sold and delivered to him at his request, and that defendant has not paid for the same, states a cause of action. *Abadie v. Carrillo*, 32 Cal. 112.

105. **Money had and received.**—A count in a complaint for money had and received, which does not allege a demand, is demurrable. *Reina v. Cross*, 6 Cal. 29; *Id.* 68.

106. An action for money had and received to the use of plaintiff lies, whenever the defendant has in his hands money of plaintiff's which in equity and conscience he has no right to retain; and this, whether there be or not any contract or privity between the parties. *Kreutz v. Livingston*, 15 Cal. 344.

107. A count in a complaint in the old form of *assumpsit*, for money had and received, in which the promise is laid of a day more than two years prior to the commencement of the action, is demurrable on the ground that it shows the demand to be barred by the Statute of Limitations. *Keller v. Hicks*, 22 Cal. 457.

108. **Money loaned.**—The declaration was for money loaned, and set out a draft drawn by defendants on a house in Boston, which it avers was drawn with the understanding that plaintiff should pay the same, but did not aver that after paying the draft, he canceled it, and delivered it up to the defendant. *Held*, that the defects were fatal in this form of action. *Lambert v. Slade*, 3 Cal. 330.

109. **Money paid, laid out and expended.**—A complaint, stating that whereas said defendant was justly indebted to plaintiffs in the sum of three thousand dollars, for money paid, laid out and expended for the use and benefit of said defendant, and at his special instance and request, to wit: at, etc., and on the first day of April, 1867, and in the sum of three thousand dollars, for money found to be due from the defendant to plaintiffs on an account then stated between them, and the said defendant being so indebted to the plaintiffs, afterwards, to wit: on the day and year aforesaid, at the place aforesaid, undertook and faithfully promised the plaintiffs to pay the same, etc., and that said sum is due and unpaid, sufficiently states a cause of action. *De Witt v. Porter*, 13 Cal. 171.

109. **Work and labor done, services rendered.**—A complaint which avers substantially that the defendant was, at a certain time, indebted to the plaintiff in a certain sum for professional services rendered at the special instance and request of the defendant, is sufficient without stating in terms the value of the services, or that the defendant promised to pay. *Wilkins v. Stidger*, 22 Cal. 232. See *post*, No. 118.

110. **Common carrier, complaint against.**—In an action to recover damages against a common carrier of passengers for a refusal to carry plaintiff, it is not necessary to allege a tender of the fare. It is sufficient to allege that

plaintiff was ready and willing to pay the defendant such sum of money as it was legally entitled to charge. *Turbell v. The Central Pacific R. R. Co.*, Jan. T. 1868.

111. Conditions precedent, how alleged. See post, § 60.

112. Conspiracy.—Where two or more persons are sued for a joint wrong done, it may be necessary to prove a previous combination between them in order to secure a joint recovery; but it is not necessary to aver this previous combination in the complaint, and, if averred, it is not to be considered as of the gist of the action. Sec. 39. *Herron v. Hughes et al.*, 25 Cal. 560.

113. Contract.—A complaint which states the facts of the case in ordinary and concise language is not demurrable, because such statement shows that the plaintiff is entitled to recover upon two different legal grounds. *Mills v. Barney*, 22 Cal. 240.

114. A complaint on a contract in which the defendant agrees to purchase a given quantity of hay, then in a stack, from the plaintiff, and pay a fixed sum therefor at a fixed time, and the hay to be weighed at the stack, should aver, if the hay has not all been delivered, a readiness or offer on the part of the plaintiff to deliver it. *Barron v. Frenck*, 30 Cal. 486.

115. In an action to recover damages for breach of a contract, it is sufficient, so far as a demurrer is concerned, to aver in the complaint the contract, the breach complained of, and general damages. *Barber v. Cazalis*, 30 Cal. 92.

116. Contract may be set forth in *hæc verba*.—A written contract may be declared on according to its legal effect, or it may be set forth in *hæc verba*. If declared on according to its legal effect, the defendant may, by the rule of the common law in a proper case, crave over of the instrument; and if it appears that its provisions have been misstated, he may set out the contract in *hæc verba*, and demur on the ground of the variance. *Stoddard v. Treadwell*, 26 Cal. 300.

117. In suit upon an agreement under seal, the complaint setting out the agreement in *hæc verba* need not aver any consideration for the agreement. The seal imparts a consideration. *Wills v. Kempt*, 17 Cal. 98; *McCarty v. Beach*, 10 Id. 461.

118. Contract, builders.—Under the rules of pleading established by the Code, the party to a written contract for the erection of a building, who has performed his part of it by the erection of the same, can bring an action against the other party who has failed to fulfil, for work and labor done and performed; but the complaint must aver the execution of the contract, its terms, the performance of the same on the part of the plaintiff, and the non-performance by the other party, and the damages thereby sustained. If, by the terms of the contract, the party who has failed to fulfil was to execute his note for the money due, payable at a future day, his failure to do so should be averred, for the ground of action against him is his failure to execute the note. *O'Connor v. Dingley*, 26 Cal. 17.

119. In such case, if there has been any variation from the terms of the written contract in the progress of the work, by consent of the parties, that fact should also be averred, and the performance of the contract as varied. *Id.*

120. The complaint contained three counts: The first, on a special contract for the erection of a warehouse; the second, for extra work on the building; and the third, for work and labor done, and materials furnished in its erection. The answer denied the allegations of the first two counts, but failed to deny the allegations of the third. *Kalkman v. Baylis*, 23 Cal. 303.

121. Contract, action to reform.—Where in reducing an agreement to writing, a material clause has been omitted by mistake, a party seeking to avail himself of the actual contract must obtain a reformation of the writing, either by a distinct proceeding to reform it, or by specially pleading the mistake in the action in which the contract is sought to be used, and asking its correction as independent relief. Under a pleading which simply states the terms of a contract, the introduction of a written agreement respecting the subject matter, cannot be followed by oral proof of a material clause alleged

to have been omitted by mistake from the writing. *Pierson v. McCall*, 21 Cal. 122.

122. **Contract, assignment, how alleged.**—Where a party sets up in his pleadings an assignment to him of a contract made with another, he must allege a positive transfer, and the character of it. *Stearns v. Martin*, 4 Cal. 227.

123. **Condition precedent.**—When the declaration states a condition precedent, and fails to aver performance, the defect must be taken advantage of by demurrer in the Court below. *Happe v. Stout*, 2 Cal. 460, see post, § 60.

124. **Contract, tort, when may be waived.**—When personal property is tortiously taken, the party aggrieved may waive the tort and sue in assumpsit for the value of the property. *F Pratt v. Clark*, 12 Cal. 89.

125. Where the breach of a contract is a wrong, the party may sue in tort, instead of suing upon the contract. *Sheldon v. Steamer Uncle Sam*, 18 Cal. 526.

126. A plaintiff has a right to waive a tort, as against factors, and to bring his action to compel them to account, and for the net proceeds arising from the sales. *Lubert v. Chauviteau*, 3 Cal. 458.

127. Under the forms of pleading at common law, the vendor of chattels, sold with a warranty of title, could, on a breach of the warranty, recover damages in assumpsit, or he might sue in an action on the case for deceit, if there had been deceit, as well as a warranty of title; but, in the first case, he must aver specially that the defendant warranted his title to the property, and that a breach of the warranty had occurred; and in the latter, that the defendant falsely or fraudulently represented himself to be the owner of the property, and that he knew his representations were false. *Miller v. Van Tassel*, 24 Cal. 463.

128. **Corporations, actions by.**—The allegation that plaintiff is a corporation under the laws of the State, is sufficient to establish the legal capacity to sue. *California Steam Nav. Co. v. Wright*, 6 Cal. 258.

129. A note was executed by the defendant, payable to "the Board of Trustees of the Sonoma Academy or their successors in office," and specified that "no change in the name, character, or management of the said academy" should affect the liability of the payor. The complaint of the "Cumberland College" stated that the plaintiff was a corporation, and the same institution of learning formerly known as the "Sonoma Academy," that the academy was, after its establishment, changed to "Cumberland College," and that the note was the property of the plaintiff. *Held*, that this complaint showed a good cause of action in the plaintiff, and that a demurrer to it was improperly sustained. *Cumberland College v. Leh*, 22 Cal. 641.

130. **Corporations, actions against.**—In suit against a municipal corporation on its bonds, the complaint sets out the bonds; avers the defendant to be a corporation; that the corporation made and delivered the bonds on good consideration, under an ordinance passed by the proper agents of the corporation, having authority for that purpose, and that defendant has failed to pay: *Held*, that the complaint shows *prima facie* a liability on the part of the corporation; and that it was not necessary to set out the ordinance, nor the vote, or other proceedings of the corporate agents, or give any further description of the agents of the corporation. *Underhill v. Trustees of the City of Sonoma*, 17 Cal. 172.

131. The allegation that plaintiff is a corporation under the laws of the State, is sufficient to establish the legal capacity to sue. *Cal. Steam Nav. Co. v. Wright*, 6 Cal. 258.

132. A complaint in an action brought by a Justice of the Peace against a county for services rendered as Justice for the county, which merely alleges that the plaintiff, as Justice of the Peace, performed services at the request of the District Attorney for the county, in cases wherein the People of the State were plaintiffs to the amount of three thousand two hundred dollars, "and that the defendant thereby became and is liable to pay the said sum," does not state facts sufficient to constitute a cause of action. *Miner v. Solano County*, 26 Cal. 116.

133. A complaint in an action against a county for damages sustained by the location of a public highway over plaintiff's land, laid out under the Act of

1861, fails to state a cause of action, unless it avers that the plaintiff had attempted to come to an agreement with the Board of Supervisors as to the amount of damages sustained, and could not agree with the Board as to such amount. *Lincoln v. Colusa County*, 28 Cal. 662. See note (2) to § 22, *ante*.

134. Co-tenants.—In an action by a tenant in common against his co-tenant, who is in the sole possession of the premises, to recover a share of the profits of the estate, a complaint which avers a tenancy in common between the parties; the sole and exclusive possession of the premises by the defendant; the receipt by him of the rents, issues and profits thereof; a demand by the plaintiff of an account of the same, and the payment of his share; the defendant's refusal; and that the rents, issues and profits amount to \$84,000, is insufficient to support the action. *Pico v. Cohumbet*, 12 Cal. 414.

135. In such complaint there are no special circumstances alleged which withdraw the case from the ordinary remedies at law, and require the interposition of equity. The action is a common law action of account; and, viewed in this light, the complaint is fatally defective, in not averring that the defendant occupied the premises upon any agreement with the plaintiff, as receiver or bailiff of his share of the rents and profits. It is essential to a recovery that this circumstance exist, and equally essential to the complaint that it be alleged. *Id*.

136. County, suit against.—The right to sue a county is not limited to causes of tort, malfeasance, etc.; but is given in every case of account after presentation to, and rejection by, the Board of Supervisors. The complaint must aver such presentment. *Price et al. v. The County of Sacramento*, 6 Cal. 254; and in actions against a county the complaint must show that the claim has been first presented to the Board of Supervisors, and been by them rejected. *McCann v. Sierra County*, 7 Cal. 123. See note (2) to § 22, *ante*.

137. Damages, allegation of.—When treble damages are given by a statute, the demand for such damages must be expressly inserted in the declaration, which must either recite the statute or conclude to the damage of the plaintiff against the form of the statute. *Chipman et al. v. Emeric*, 5 Cal. 239.

138. If the plaintiff, in an action to recover possession of a mare, and damages for her detention, claims damages because the animal has lost flesh in consequence of having been kept upon short pasturage, and because she was detained during the breeding season, these facts must be specially averred as the ground of damages. *Stevenson v. Smith*, 28 Cal. 102.

139. A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters. *Dabovich & Co. v. Emeric*, 12 Cal. 171.

140. A complaint which alleges that the plaintiffs were, on a certain day, the owners and proprietors of a certain valuable water ditch for the purpose aforesaid, and that afterwards, on the same day and year, at, etc., aforesaid, the said defendant's ditch was so badly and negligently constructed and managed, and the water therein so negligently and carelessly attended to, that said ditch broke and gave way, and the water therein flowed over and upon the ditch of plaintiffs, greatly damaging and injuring the same, and carrying down therein and thereon great quantities of rock, stone, earth and rubbish, and breaking said plaintiff's ditch, and depriving them of the use and profit of the water flowing therein, to said plaintiff's damage of \$3,000, and thereof they bring suit, is sufficient. *Tuolumne County Water Co. v. Columbia and Stanislaus Water Co.*, 10 Cal. 193.

141. In an action for damages for breaking defendants' dam and flooding the plaintiffs' mining claim, where the complaint is in one count, and charges that "the defendants' said reservoir, by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness and mismanagement on the part of the said defendants, broke away," etc.: *Held*, that the complaint is sufficient. *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413.

142. Whether such negligence arose from the want of care in constructing the dam, or want of care in letting off the water, is not sufficiently material, under our system of pleading, to require separate counts. *Id*.

143. In an action brought to recover damages by the owners of a licensed

ferry against a party alleged to have run a ferry within the limits prohibited by law, it was held that the complaint should have alleged that defendant run his ferry for a fee or reward, or the promise or expectation of it, or that he run it for other than his own personal use or that of his family, and that the omission of these allegations was fatal. *Hanson v. Webb*, 3 Cal. 236.

144. In an action against a sheriff for special damages, resulting from a refusal on the part of the sheriff to make and deliver to plaintiff a deed to certain premises purchased by plaintiff at sheriff's sale, when there is no allegation in the complaint of title, nor any averment that, in case the deed had been executed, plaintiff would have been able to recover possession of the premises, or the rents and profits: *Held*, that such complaint is insufficient. *Knight v. Fair, Sheriff*, 12 Cal. 296.

145. **Divorce.**—The charge of adultery should be stated with reasonable certainty as to time and place, so as to enable the defendant to prepare to meet it on the trial. *Conant v. Conant*, 10 Cal. 249.

146. Where, in a suit for divorce brought by the wife, she charged in her complaint that adultery had been committed by her husband whilst she was living with him "at the city of San Francisco, at divers times, with persons to the plaintiff unknown," and adultery committed since she ceased to live with him "at the said city of San Francisco, with divers other persons, whose names are to the plaintiff unknown:" *Held*, that the complaint was demurrable, but that the defendant, by failing to demur, waived the objection so far as the want of specification of the acts constituting the charge is concerned. *Id.*

147. The charge of adultery should be stated with reasonable certainty as to time and place, so to enable the defendant to prepare to meet it on the trial. *Conant v. Conant. Id.*

148. The doctrine of recrimination, or *compensatio criminis*, applicable in suits for divorce, and the several offenses which, by the statute, constitute grounds of divorce, are pleadable in bar to such suits, the one to the other, within the principle of the doctrine. *Id.*

149. The plaintiff must aver and prove—though not denied—that he or she has been a *bona fide* resident of this State six months before making the application for a divorce. *Bennett v. Bennett*, 28 Cal. 599.

150. The averment of marriage, if not denied, need not be proven. *Fox v. Fox*, 25 Cal. 587.

151. It must affirmatively appear in the complaint that the husband was the owner of property sufficient to provide for the necessities of life, and neglected so to do, where the application is made on the ground of the wilful neglect of the husband, for the period of three years, to provide the common necessities of life, having the ability to provide the same. *Washburne v. Washburne*, 9 Cal. 476.

152. **Ejectment.**—In actions to recover real property, the complaint need not state the residence of either of the parties. The statute provides for the trial in certain counties, and the situation of the premises, not the residence of the parties, determines the county. *Doll v. Feller*, 16 Cal. 433.

153. Under our system of pleading, the plaintiff in the action to recover possession of real estate, is not limited to any particular form of complaint, but the form may be adapted to the facts desired to be put in issue. Plaintiff may allege that he is seized of the premises, or of some estate thereon, in fee, for life, or for years, or he may aver a former possession and ouster; but whatever is put in issue and determined, is conclusive and final. *Caperton v. Schmidt*, 26 Cal. 490.

154. Plaintiff may aver title in general terms; but if he attempt to set forth in his complaint a specific derangement of his title, he must aver every fact that he could be required to prove in order to recover. And where one of the links in his chain of title, as set out in the complaint, is a will, the complaint must aver that the will has been admitted to probate. *Castro v. Richardson*, 18 Cal. 478.

155. The plaintiff must aver either title or possession. The mere taking from the land a portion of the herbage growing thereon is not sufficient to give a right of possession. *Steinback v. Fitzpatrick*, 12 Cal. 295.

156. Where the complaint in ejectment avers that the land sued for is known by the name of "La Jota," heretofore granted to plaintiff by the Mexican Government, and the patent issued thereon refers to the grant, the proceedings before the Land Commission and the United States Court for confirmation, these recitals in the patent support the averment of title through the grant. *Yount v. Howell*, 14 Cal. 465.

157. A complaint which avers an ownership and seizure in fee in the plaintiff of the demanded premises, and an ouster by the defendant on a day named, before the commencement of the action, is sufficient, without the further averment that the plaintiff is the owner in fee at the commencement of the action. *Salmon v. Symonds et als.*, 24 Cal. 266.

158. An allegation that the plaintiff, on a day named, "was possessed of" certain lands therein described, "which said premises the said plaintiff claims in fee simple absolute," is an allegation of title in the plaintiff to the premises in fee simple absolute. *Marshall v. Shafter*, 32 Cal. 176.

159. It is not necessary to aver an ouster by the defendant. An averment of a wrongful withholding of the possession by the defendant, is equivalent to an averment of an ouster. *Id.*

160. Where the ouster was alleged to have taken place in June, 1856, while the title of plaintiff was alleged to have accrued only in May, 1859: *Held*, that if this were not a clerical error, it is a defect which cannot be taken advantage of after verdict. *Coryell v. Cain*, 16 Cal. 567.

161. Complaint need not state the exact time of the alleged ouster, especially where no claim is made for damages, and no recovery had for them—the allegation in this case, as to time of ouster, being "on or about December 12th, 1857." *Collier v. Corbett*, 15 Cal. 183.

162. To enable the plaintiff to recover on prior possession, he must allege and prove an actual ouster. *Watson v. Zimmerman*, 6 Cal. 46.

163. The want of such an allegation in the complaint is a defect which cannot be cured by a default taken through the mistake or inadvertence of defendant's counsel. *Id.*

164. A complaint in ejectment, averring prior possession in plaintiff, entry and ouster by defendant, and that he is still in possession, is sufficient. *Boles v. Cohen*, 15 Cal. 150.

165. Averment of wrongful withholding equivalent to averment of an ouster. *Marshall v. Shafter*, 32 Cal. 176.

166. Where plaintiff relies not on the Possessory Act of the State, but on the prior possession of himself, or of parties through whom he claims, such possession must be shown to have been actual in him or them; and by actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property. *Coryell v. Cain*, 16 Cal. 567.

167. A party relying on the Possessory Act of the State must show compliance with its provisions, and can then maintain an action for the possession of lands occupied for cultivation or grazing, without showing an actual inclosure or actual possession of the whole claim. *Id.*

168. In this case the complaint should only have averred that on some day designated plaintiffs were possessed of the land, describing it; that while thus possessed, defendant entered upon the same and ousted them, and has ever since withheld the possession from them to their damage, specifying such sum as might cover the value of the use and occupation from the date of the ouster. *Id.*

169. A complaint should not set out the mesne conveyances through which plaintiff derails title. These are matters of evidence, not of pleading, and should be stricken from the complaint on motion. *Id.*

170. Where plaintiff has been in possession of the premises for which he sues, it will be sufficient for him to allege such possession, and the entry, ouster and continued withholding by the defendant. Such allegations are proper when they correspond with the facts, but they are not essential. In this State possession does not always accompany the legal title, as the statute

authorizes a sale and conveyance of land held adversely by a third person. *Payne & Denney v. Treadwell*, 16 Cal. 220.

171. An allegation that the possession of defendant is "wrongful or unlawful" is not the statement of a fact, but of a conclusion of law. The words are mere surplusage, and though they do not vitiate, they do no good. *Id.*

172. There is no necessity of negating the possible rightful character of defendant's possession. Such possession is a pleadable and issuable fact; but if it rest upon any existing right defendant must show it affirmatively in his defense. *Id.*

173. The only facts necessary to be alleged are, that the plaintiff is seized of the premises, or of some estate therein in fee, or for life, or for years, according to the fact, and that the defendant was in their possession at the commencement of the action, and withholds the possession from plaintiff. The seizin is the fact to be alleged. It is a pleadable and issuable fact, to be established by conveyance from a paramount source of title, or by evidence of prior possession. *Id.*

174. In ejectment, a variance between the alleged seizin and right of possession of plaintiff, and the date of conveyance to him, is immaterial, if the latter be previous to the commencement of the action. Right of possession in plaintiff and occupation by defendant, at that time, are sufficient. *Stark v. Barrett*, 15 Cal. 361.

175. A complaint, with general averments in the usual form, is sufficient without a specific averment of the facts. To set out the facts connected with the title, and the wrongful acts of the defendant, would produce confusion without benefit. *Garrison v. Sampson*, 15 Cal. 93.

176. The allegations of the complaint must be construed most strongly against the pleader. A complaint that alleges he is in possession in one place, and in another avers that he is not, shows no cause of action. *Dickinson v. Maguire*, 9 Cal. 46.

177. Consequently, where the plaintiff's complaint in ejectment averred title in plaintiff under a sheriff's sale, made by one sheriff, and a deed executed by his successor: *Held*, that the plaintiff could not recover. *Alderson v. Bell and wife*, 9 Cal. 315.

178. Notwithstanding our statute has dispensed with the old form of pleading, and it is no longer necessary to allege a fictitious demise, still, facts sufficient must be pleaded to show the plaintiff's right to recover, and it will not do to state conclusions of law in place thereof. *Payne v. Treadwell*, 5 Cal. 310.

179. Where the allegations of a complaint in the District Court are, that the plaintiff was in possession, and lawfully entitled to the possession, at the time he was evicted by the defendant: *Held*, that the complaint must be treated as a declaration in ejectment. *Ramirez v. Murray*, 4 Cal. 293.

180. Complaint may be for two separate and distinct pieces of land; but the two causes of action must be separately stated, affect all the parties to the action, and not require different places of trial. *Boles v. Cohen*, 15 Cal. 150.

181. A complaint, averring that plaintiff was in actual possession of the premises by inclosure and cultivation; that defendant, on a certain day, entered upon the same, and ousted the plaintiff, and defendant is still in possession, is sufficient. *Boles v. Weisenback*, 15 Cal. 144.

182. In a complaint in ejectment, parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass in the nature of waste pending the action; but the grounds of equity, interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought. *Naloma Water & Mining Co. v. Clarkin*, 14 Cal. 544.

183. Nor is a complaint in such action sufficient, which fails to aver a continued adverse holding by the defendant. *Steinback v. Fitzpatrick*, 12 Cal. 295.

184. In real actions, it is necessary for the demandant to allege, and, if traversed, prove a seizin in himself, or his ancestors through whom he claims; and in general it is also necessary to aver that he was seized by taking the escheys or profits. *Payne v. Treadwell*, 5 Cal. 310.

185. An allegation of the value of the use and occupation, rents and profits of the premises for the period during which defendants were in the wrongful possession and excluded plaintiff, is sufficient to charge defendants, without any averment that they received such rents and profits. The terms "rents and profits" are not used in the present case in a technical sense. The whole averment is in effect only that the value of the use of the premises while plaintiffs were wrongfully excluded, was the amount stated. *Patterson v. Ely*, 19 Cal. 28.

186. *Goodwin v. Stebbins*, 2 Cal. 103, so far as it holds that the averment that plaintiffs "were lawfully entitled to the possession of the premises," was an allegation of a material fact, and hence sufficient, not law. *Payne & Devey v. Treadwell*, 16 Cal. 220. *Payne v. Treadwell*, 5 Cal. 310, in which the averment of the complaint was, that plaintiffs had "lawful title as owners in fee simple of the premises," and "that the defendant is in possession, and unlawfully withholds the same," so far as it decides that a more particular statement of 'the circumstances' of defendant's possession or withholding is necessary, overruled. 16 Cal. 220.

187. In ejectment for mineral lands, plaintiff averred possession of a large tract of land, including the mining ground in controversy, and that he occupied the land for agricultural and mining purposes, without stating that any use was made of the particular portion held by defendants. This averment of possession, and also the averment of ouster, were insufficiently denied in the answer; but the answer averred affirmatively, that, at the time defendants entered upon the ground in dispute, it was a part of the public domain of the United States, contained large and valuable deposits of gold, that they entered upon and took possession of it for mining purposes, and that they have since held and used it for such purposes only. The Court below gave judgment for plaintiff on the pleadings. *Held*, that these affirmative averments of defendants being proved, plaintiff could not recover without showing such an actual and meritorious possession and occupancy as rendered the interference of the defendants unjust and inequitable; that he could not recover on the pleadings, because the character of his possession did not appear—the complaint not averring that this particular portion of the land was ever used by plaintiff for any purpose whatever. *Smith v. Doe*, 15 Cal. 100.

188. The allegation of possession is too broad to defeat the rights of a person who has, in good faith, located upon public mineral land for the purpose of mining. *Id.*

189. Complaint should not state the evidence, but only the ultimate facts constituting the cause of action. *Depuy v. Williams*, 26 Cal. 313.

190. Matters of evidence and unnecessary matters of description of demanded premises, should be stricken out of a complaint to recover possession of land. *Wilson v. Cleveland*, 30 Cal. 192.

191. Description of land in complaint.—See post, § 58.

192. Executors, administrators, guardians, etc.—The failure of the plaintiff to allege in his complaint in a suit on such claim, its presentation to and rejection by the administrator, is an objection that the complaint does not state facts sufficient to constitute a cause of action. *Hentsch v. Porter*, 10 Cal. 555.

193. But the cause of action mentioned in the Code is a present subsisting cause of action, entitling the plaintiff to judgment at the time the action was commenced. *Id.*

194. A legatee who has been represented by counsel at the allowance of accounts against the estate will not be allowed, after a lapse of time, to come in and have the allowance set aside on a mere general averment of newly discovered evidence. *Williams v. Price*, 11 Cal. 212.

195. In such a case it is not sufficient to allege ignorance at the time of allowance, but the plaintiff must go farther and show that he could not, with the use of due diligence on his part, have made himself acquainted with, or ascertained the existence of the facts. *Id.*

196. Though an administrator be described in the caption of the complaint

as administrator, yet the facts show that it is not sought to charge him as administrator, and no relief is sought against the estate: *Held*, that the objection that he is sued in his representative capacity is untenable. *People v. Houghtaling*, 7 Cal. 348.

197. A complaint alleging that the testator was seized and possessed of certain premises at the time of his death, on the nineteenth of July, 1855, and that the plaintiffs were appointed the executors of his last will and testament, without averring in direct terms, either previously or subsequently, the fact of the testator's death, or that he left a last will and testament, is defective as a pleading. *Halleck v. Mizer*, 16 Cal. 574.

198. The complaint here averring that plaintiffs were duly appointed executors of the last will and testament of the deceased, and have ever since been such executors, and as such have been ever since in the possession of the premises, is not demurrable, on the specific ground that it does not show that plaintiffs are the executors of F., or have any authority to maintain the action, though it is subject to other objections. The complaint should state the death of F., his leaving a last will and testament, the appointment therein of the plaintiffs as executors, the probate of the will, the issuance of letters testamentary thereon to the plaintiffs, and their qualification and entry upon the discharge of their duties as executors. *Id.*

199. One in the possession of personal property as administrator can bring an action in his own name against a wrong doer for its wrongful conversion, without setting forth, in the complaint, his official and representative capacity. An allegation in the complaint, that the plaintiff sues as administrator, is surplusage. *Munch v. Williamson*, 24 Cal. 167.

200. Failure of, consideration.—A county warrant drawn by the Auditor, directing the Treasurer to pay H. E. Co. nine hundred and sixty-five dollars for services as county printer, was for a valuable consideration indorsed by H. E. Co. to F., and by F. transferred to plaintiff for nine hundred and sixty-five dollars, paid by the latter. The warrant was, in fact, illegal and valueless, and payment being for this reason refused by the Treasurer, plaintiff instituted the present action against H. E. Co. and F. to recover back the amount paid by him, setting up in the complaint the foregoing facts, and the defendants, at the time of their transfers, represented that the warrant was valid, and would be paid on presentation. *Held*, on demurrer, that the complaint stated a cause of action, and that on the facts alleged plaintiff was entitled to recover from defendants the money which he had paid for the warrant. *Keller v. Hicks*, 22 Cal. 457.

201. A partial failure of consideration cannot be pleaded in bar of an action upon a note given for the purchase money of land. *Reese v. Gordon*, 19 Cal. 147.

202. Foreclosure.—The averment in the complaint that the plaintiff is the owner of the note and mortgage in suit, is a sufficient answer to a demurrer, on the ground that it does not appear by the complaint that the plaintiff is the holder of the note. *Rollins v. Forbes and Wife*, 10 Cal. 299.

203. An action will not lie on the mere recital in a mortgage of the existence of the debt. In an action upon the promise to pay money, if the complaint contains no averment of consideration or of indebtedness, except by way of recital, it is insufficient. *Shafer v. Bear River and Auburn W. and M. Co.*, 4 Cal. 294.

204. A general averment in the complaint, to enforce the vendor's lien, that the mortgage is defective as a security, is not sufficient to withdraw the case from the general rules above stated. *Hunt v. Waterman*, 12 Cal. 301.

205. In foreclosing a mortgage containing a stipulation that the mortgagee should be entitled to all costs, including counsel fees not exceeding five per cent. of the amount due, it is not necessary to aver in the complaint that five per cent. was reasonable counsel fees, as the counsel fees thus stipulated to be paid were not the cause or action, but, like costs, a mere incident to it, and might be fixed by the Court, at its discretion, not exceeding the five per cent. *Carriere v. Minburn*, 5 Cal. 435.

206. In an action to foreclose a mortgage, an allegation that a party who is made a co-defendant with the mortgagor, has or claims to have some interest in,

or claim upon the mortgaged premises, is sufficient without averring the character of the interest. *Anthony v. Nye*, 30 Cal. 401.

207. An allegation in a complaint to foreclose a chattel mortgage, that the furniture and upholstery were furnished for and used in the furnishing of the hotel in the City and County of San Francisco, known as the "Willows," is not an allegation that the goods were used in a "hotel," nor that they were used in a building called the "Willows," nor that the "Willows" was a hotel. *Stringer v. Davis*, 30 Cal. 318.

208. If the complaint in a foreclosure suit avers that the mortgage was executed by the defendant (thereby making it by averment a legal mortgage), and also sets out a copy of the same, and it appears on its face not to be legal as distinguished from an equitable mortgage, the averment may be rejected as surplusage. *Vassault v. Austin*, 32 Cal. 597.

209. Action to redeem.—The plaintiff, in an action to redeem a mortgage, need not allege or prove a tender of the amount due upon the mortgage debt previous to the commencement of the action. *Daubenspeck v. Platt*, 22 Cal. 330.

210. Fraud, to set aside a conveyance.—*Query*: Whether a complaint, seeking to set aside a conveyance on an allegation that it was made voluntarily and without a valuable consideration, and to hinder, delay and defraud creditors, and particularly plaintiff, is demurrable, because of the generality of this allegation of fraud, and what degree of particularity in the statement of facts and circumstances is required when a fraudulent conveyance is alleged to have been made. *Kohner v. Ashenauer*, 17 Cal. 678.

211. In a bill to set aside certain conveyances of real estate as fraudulent against creditors, there is no necessary inconsistency in averring the grantee to be a fictitious person, and that the deed to him, or in his name, was made to hinder and defraud creditors. *Purkitt v. Polack*, 17 Cal. 327.

212. Plaintiff sues defendants for partition of certain property. The Court orders a sale of the property and distribution of the proceeds; after the sale, G. files a petition, stating that he is creditor of one F. M. Harris (not plaintiff), and has an attachment lien on the interest of said F. M. Harris, in the property sold; that said property, in fact, belonged to F. M. Harris, and that any conveyances of the same from him to plaintiff were merely colorable, for the use and benefit of F. M. Harris, and made to hinder, delay and defraud his creditors; G. asked the Court to pay him the share of the proceeds of the partition sale coming to plaintiff; Court refused.* *Held*, that there was no error; that the petition of G., being an attempt to defeat a conveyance to plaintiff, on the ground of fraud, is insufficient in this, that there is no allegation of the insolvency of F. M. Harris, and that the charges of fraud are too general, and do not state the specific facts constituting the fraud. *Harris v. Taylor*, 15 Cal. 348.

213. A party is not confined to his remedy by statute, but may resort to a Court of equity for relief against a judgment obtained by fraud or surprise. *Carpentier v. Hart*, 5 Cal. 407.

214. Plaintiff and defendant were partners in the purchase of mining claims. Defendant was the active partner, and acquainted with the value of a certain claim owned by the firm, plaintiff being ignorant of its value; plaintiff sold his interest in this claim to defendant for greatly less than its value. *Held*, that in a suit by plaintiff against defendant to set aside this sale for fraud and for an account, etc., an averment that defendant is indebted to plaintiff on an account in a sum greater than that paid by defendant for the mining, is in effect an offer to place defendant in *status quo*, as per the rule of law. *Watts v. White*, 13 Cal. 321.

215. A complaint in equity, filed for the purpose of setting aside a grant, on the ground that it was obtained by fraud, must state specifically and definitely the facts constituting the fraud. *Oakland v. Carpentier*, 21 Cal. 642.

216. In an action brought to vacate a patent for land on the ground that its issuance was procured from the government by false suggestions, fraudulent concealments, and by misrepresentations, the acts of fraud and misrepresentation on which the general charge is based must be specified in the complaint, or it

will not state facts sufficient to constitute a cause of action. *Semple v. Hagar*, 27 Cal. 166.

217. A complaint in an action in the name of The People on the relation of a private individual, to cancel a patent for a tract of land issued by the State to the defendant, which merely avers that the relator is seized and possessed of the land, and that his title was derived from the State of California under and by virtue of the location of a school warrant made under and in accordance with the provisions of an Act of the Legislature; that said location was duly and properly made, and in all respects according to the provisions of said Act, does not state facts sufficient to constitute a cause of action. *People v. Jackson et al.*, 24 Cal. 632.

218. Bill avers, in substance, plaintiff to be holder of several notes and mortgages executed to him by defendants, H. and wife, and that defendant O'D. proposed to plaintiff to buy said notes and mortgages for a certain sum, which plaintiff agreed to take; that O'D. desired, before closing the purchase, to see H. and wife, and learn whether they could be induced or compelled to pay the notes; asked plaintiff for the notes and mortgages to show H. and wife, and that plaintiff delivered them to him, relying on his honesty; that O'D. saw H. and wife, who were illiterate, and by representing himself as the owner of the notes, etc., which he exhibited, by threatening to sue, etc., induced H. and wife to give him an absolute deed in fee simple of the mortgaged premises for one hundred dollars, the premises being worth many thousands of dollars; that O'D. then returned the notes, etc., declined purchasing of plaintiff, and concealed the fact of having a deed from H. and wife; that all this was a fraud of plaintiff; that O'D. in taking said deed acted as agent and trustee of plaintiff and for his benefit, and should have taken the deed in his name; that in equity said O'D. ought to declare such trust, and execute a deed of the property to plaintiff; that on account of a defect in the record of one of the mortgages, it does not impart notice, etc., and that if O'D. should sell the property, as he is trying to do, to an innocent purchaser, such sale would injure plaintiff irreparably. Other parties are made defendants as claiming some interest subsequent to plaintiff. Complaint prays for injunction against O'D.; that said trust be declared; that he execute a deed to plaintiff; that H. and wife execute to plaintiff such further conveyance, and assurance, and release of equity of redemption as may be just in satisfaction of said mortgages, and that all defendants be barred, foreclosed, etc., or that the deed by H. and wife to O'D. be declared void and canceled, and he be foreclosed of all equity of redemption thereunder; and if such deed is canceled, that then plaintiff have judgment against H. and wife on said notes; that all the defendants be barred, etc., and premises sold to pay the judgments, etc. O'D. demurs that inconsistent causes of action are united. *Held*, that the demurrer is not well taken; that the allegations of the complaint make out a homogeneous case as against all the defendants, to wit: a right to enforce the mortgages, and to a decree of foreclosure binding subsequent claimants, of whom O'D. by his purchase is one, with notice of the mortgages. *DeLeon v. Higuera*, 15 Cal. 483.

219. A creditor who has purchased land of the debtor at sheriff's sale, and obtained a sheriff's deed therefor, in a complaint to cancel a deed given by the debtor to defraud him before judgment was recovered, need not aver that the debtor was insolvent when he made the deed. *Hager v. Shindler*, 29 Cal. 47.

220. The complaint in a suit in equity brought by the judgment creditor, who has a sheriff's deed of land, to set aside and cancel a deed of the same, given by the judgment debtor before the recovery of judgment to defraud the creditor, need not aver that the plaintiff has exhausted his remedy at law by issuing an execution and having it returned *nulla bona*. *Id.*

221. Where a bill in equity is filed to cancel a deed, which avers that the grantor deposited the same with a third person, to be by him delivered to the grantee upon the order of the grantor or his agent, and that before the agent gave the order, the grantor directed the third person not to deliver the deed, but does not aver that the third person intends or threatens to deliver the deed to the grantee, or that he will disobey the instructions of the grantor, the bill

does not state facts sufficient to constitute a cause of action. *Fitch v. Bunch*, 30 Cal. 208.

222. **Judgment, relief against.**—To obtain the aid of chancery to vacate a judgment, a party must show that he has exhausted all proper diligence to defend in the suit in which judgment was rendered. If he relies on fraud and deception practiced on the Court in managing, procuring, and giving evidence, he must show that by such practice he was defrauded of his opportunity to defend, and that his defense would otherwise have been effectual. *Biddle v. Baker*, 13 Cal. 295.

223. The complaint—the suit being to set aside a judgment of *H., L. & B. v. Erwin*—after setting out minutely the proceedings adopted by them in having the Clerk enter up the judgment, then avers that “said proceedings and circumstances under which said judgment was entered up by said Clerk, render the same void in law, the said Clerk having no power or jurisdiction to enter said judgment under the circumstances and in the manner stated, and that the same is fraudulent as against this plaintiff, and tends to his great and irreparable injury;” that W., attorney of *H., L. & B.*, was a party to the fraud; that the judgment was without consideration—was false, covinous and fraudulent—and that E. is insolvent, states facts sufficient to constitute a cause of action, and W. being charged as a party to the fraud, is properly joined as defendant. *Crane v. Hirshfelder*, 17 Cal. 467.

224. In order to set aside a judgment or conveyance on the ground of fraud, it is not sufficient to aver in general terms that such judgment or conveyance was fraudulent, but the facts and circumstances constituting the alleged fraud must be set forth. *Castle et al. v. Bader et al.*, 23 Cal. 75. See also *Snow v. Halstead*, 1 Cal. 359.

225. Where a judgment by confession is attacked by a creditor as fraudulent against him, on the ground that the object of the debtor, and the judgment creditor was to assist the debtor in forcing a compromise with his other creditors rather than to enforce the judgment, the complaint must plead this ground of objection to the judgment. A general averment that the intent was to hinder, delay and defraud, is insufficient. *Meeker v. Harris*, 19 Cal. 278.

226. Such general averment of fraud will not put the adverse party on his defense. *Id.*

227. Where a creditor files a bill to cancel and set aside a judgment, rendered against his debtor, on the ground that it is fraudulent, and to reach the property of the debtor, and have it applied in satisfaction of his demand, the complaint must aver, either that the plaintiff has acquired a lien on the property he seeks to reach, or that he has recovered a judgment upon which an execution has been issued, and returned no property found. *Castle et al. v. Bader et al.*, 23 Cal. 75.

228. A complaint in an action to set aside a judgment, which contains no averment showing that relief could not have been obtained on motion, may be deniable, but if defendant fails to demur, and answers on the merits, and the fact supplying the defect appear in the record, the objection is waived. *Ribend v. Kreutz*, 20 Cal. 109.

229. **Relief on account of.**—In an action for relief on this ground, the fraud is the substantive cause of action, and not the discovery. If, therefore, the plaintiff alleges the fraud to have been committed more than three years before the commencement of his action, his cause of action is barred, and his complaint is demurrable. If the plaintiff wishes in such a case to bring himself within the exception of the statute, he must allege the fact of a discovery of a fraud at a period bringing him within the exception. *Sublette v. Tinney*, 9 Cal. 423; *Carpentier v. City of Oakland*, 30 Cal. 444.

230. A complaint alleging that the defendant collected and received certain money, as the agent or attorney in fact of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of fraud, and for judgment and execution against his person and property, is insufficient to sustain a verdict convicting the defendant of fraud. *Porter v. Hermann*, 8 Cal. 623.

231. The complaint should state the facts that constitute the fiduciary capacity, as well as its nature and extent. *Id.*

232. A bill in equity, to obtain relief on the ground of fraud, is not sufficient if it charge fraud in general terms, but the facts constituting the fraud should be stated. *Kent v. Snyder*, 30 Cal. 666.

233. A complaint in equity, to have a deed absolute on its face, reformed so as to become a deed of trust, which avers that the deed does not express the trusts and conditions upon which it was agreed the property should be transferred, but that such conditions were by the defendants fraudulently suppressed, without any statements of what acts of fraud were practiced, does not state facts sufficient to constitute a cause of action. *Id.*

234. When the cause of action stated in the complaint is for relief, on the ground of fraud, and is stated to have accrued more than three years before the commencement of the action, the complaint should also aver that the acts constituting the fraud had been discovered within three years; but if the replication contains this averment, and this issue is tried without objection, the irregularity in the answer of presenting the issue will be disregarded. *Boyd v. Blankman*, 29 Cal. 20.

235. Husband and wife.—A complaint by husband and wife to recover the homestead conveyed away by the deed of the husband alone, must aver either that the premises were occupied as a homestead at the date of the conveyance, or that they had not been previously abandoned. *Harper v. Forbes*, 15 Cal. 202.

236. In an action for the division of the common property of husband and wife after a decree of divorce, the plaintiff, to bring herself within the provisions of the act "defining the rights of husband and wife," passed April 17th, 1850, must affirmatively state such facts as give her the right to the property under the act. *Dye v. Dye*, 11 Cal. 163.

237. In an action for a division of the common property after a divorce, where it appears that the property in question had been in the possession of the husband before marriage without title, and that he purchased the property and obtained deeds therefor after marriage, the purchase money being paid with the common funds: *Held*, that it was common property. *Held further*, that the defendant having purchased with the common funds from another, under a deed of warranty, he is estopped to deny, as far as plaintiff is concerned, that he acquired a good title by the purchase. *Johnson v. Johnson*, 11 Cal. 200.

238. Where the plaintiff averred in her complaint, in a suit brought for her distributive share of the estate of an alleged deceased husband, that the deceased made proposals of marriage to her, when she accepted, and consented to live with him as his true and lawful wife; and that in accordance with his wishes, she thenceforth lived and cohabited with him as his wife, always conducting herself as a true, faithful and affectionate wife should do: *Held*, that these were insufficient averments of the existence of a marriage, and that the facts averred were only *prima facie* evidence of a marriage. *Letters v. Cady*, 10 Cal. 533; see *People v. Anderson*, 26 Cal. 129.

239. In suit against the wife for her separate debt, for which she was liable *in personam* before coverture, the complaint need not set out any separate property of the wife. *Bostic v. Love*, 16 Cal. 69.

240. Where husband and wife are sued for rent claimed on a lease made by plaintiff to the wife, plaintiff and the wife being tenants in common of the property: *Held*, that the wife can be liable only as sole trader under the statute; and that the complaint must aver facts requisite to establish her liability in that character, and that the allegation that she "was doing business as a *femme sole*, with the consent of her husband," is insufficient. *Aiken v. Ann Davis and her Husband*, 17 Cal. 119.

241. Injunctions, what averments sufficient.—An allegation in the complaint that plaintiff was in possession of the land as owner when defendant entered, is a sufficient statement of title in suit for injunction to restrain trespass. *Hicks v. Compton*, 18 Cal. 206.

242. A bill to restrain vexatious litigation, upon the ground that the right to real property has been determined in former suits, must show that the title to the property was determined in a suit or suits, in which all the claimants to the title were parties. *Knowles v. Inches*, 12 Cal. 212.

243. A complaint alleging that plaintiffs had, for a long time, conveyed water from a stream for mining purposes by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in the peaceable possession thereof when defendants wrongfully diverted the same, and deprived plaintiffs thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction. *Tuolumne Water Co. v. Chapman*, 8 Cal. 392. See sec. 112, and authorities thereunder.

244. A complaint which joins an action of trespass, *quare clausum fregit*, with ejectment, and prays for an injunction, will be held bad on demurrer. *Bigelow v. Grove*, 7 Cal. 135.

245. In this case, it was held that the temporary injunction granted on filing the complaint should not have been dissolved before the hearing; that on the facts stated in the complaint, an action for damages would be fruitless; that although the complaint does not aver absolute insolvency of defendants, still enough is averred to satisfy the Court that a judgment for damages would be worthless, and hence the injunction ought to have been continued. *Hicks v. Compton*, 18 Cal. 206.

246. To entitle a plaintiff to the equitable interposition of the Court, he must show a proper case, and one in which he has no adequate remedy at law. *De Witt v. Hays*, 2 Cal. 463.

247. The complaint avers title in plaintiff to a tract of land; that the possession of defendants is forcible and unlawful; that an action for forcible entry has been commenced by plaintiff against defendants, and is still pending and undetermined; and asks for an injunction to restrain defendants from cutting and removing timber from the land—without seeking in this suit to be restored to the possession, the object of the suit being to preserve the property during the pendency of that action. Held, that injunction lies, although no action of law has been brought to try the title; that the jurisdiction of equity in such cases, to grant first a temporary and subsequently a perpetual injunction, does not depend upon the question whether or not such action at law has been brought; that the rule under the English chancery system was the same, and that our statute is not more restrictive. *Hicks v. Michael*, 15 Cal. 107. See 27 Cal. 643.

248. Cutting, destroying and removing growing timber is sufficient ground for an injunction, without any allegations of insolvency. *Henshaw v. Clark and one hundred and three Chinamen*, 14 Cal. 460.

249. F., defendant, began suit against the Volcano Water and Mining Company, to subject to sale the ditch of that name, including aqueducts, flumes, culverts, dams, cabins, etc., in enforcement of a mechanic's lien. Subsequently, the ditch, etc., was sold on a judgment in favor of one Harris, and purchased by S., from whom plaintiff, as judgment creditor of the company, redeemed, and in due time received the sheriff's deed. Afterward, F. had a decree directing a sale of the ditch, etc., to satisfy his lien. Plaintiff sues to quiet title, alleging that F.'s decree is fraudulent, that he had no lien, and that he is about enforcing the decree, which is a cloud on plaintiff's title. Held, that, aside from any question of fraud, the action lies; that the existence of a decree, founded upon proceedings taken prior to plaintiff's title, and seeking to condemn the property by virtue of an asserted lien older than such title, would be a cloud upon that title. *Head v. Fordyce*, 17 Cal. 149.

250. Insufficient allegations.—The simple allegation of "irreparable injury" is not sufficient; it should appear to the Court from the facts set forth in the bill. *De Witt v. Hays*, 2 Cal. 463.

251. Where the complaint alleged that in September, 1849, plaintiff settled on a tract of land, "the same being public land of the United States;" that subsequently H., a foreigner, built a house on and occupied a portion of the tract; and now that H.'s executor is offering the same for sale, and plaintiff prays an injunction, and damages for the occupation: Held, that the plaintiff sets forth no principle on which to base a claim. *O'Connor v. Corbett*, 3 Cal. 370.

252. In a bill for partition among tenants in common, and for injunction against cutting timber trees: Held, that defendants being tenants in common,

had the right to the enjoyment of the common estate, and to cut timber and use or dispose of it at least to an extent corresponding to their share of the estate; and that as the complaint neither avers the insolvency of defendants, nor that they are exceeding this share, injunction does not lie. *Hahn v. Peck*, 18 Cal. 640.

253. Where suit is pending in one Court on a note of defendant, though no summons has been served, and no appearance made, he cannot bring a bill in equity, in another Court, to enjoin the collection of the note, or to cancel it, the averment being, simply, that he has a good defense to the note. *Smith v. Sparrow*, 13 Cal. 596.

254. Bill for an injunction to restrain defendants from taking possession of certain real estate, a warehouse and wharf. Complaint avers plaintiffs' title to the property, and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises; and that unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business, and their property be destroyed. *Held*, that these allegations are insufficient to authorize an injunction, there being no averment of insolvency of defendants, and the complaint not showing that there is no adequate remedy at law. *Tomlinson v. Rubio*, 16 Cal. 202.

255. Where the complaint alleged that the defendants had a mining ditch above one previously constructed by defendants, and had thereby diverted the water of the stream from plaintiff's ditch, but did not aver that the injury was continuing, or threatened to be continued, or likely to be continued: *Held*, that it was sufficient for the recovery of damages, but not to sustain an injunction. *Coker v. Simpson*, 7 Cal. 340.

256. In a bill for an injunction, the mere allegation of great and irreparable injury to a vested right is insufficient; the facts stated must satisfy the Court that the apprehension of such injury is well founded. *Branch Turnpike Co. v. Board of Supervisors of Yuba County*, 13 Cal. 190.

257. Defendant, as coroner and acting sheriff, levied on, and advertised for sale, all the right, title and interest of T. in certain horses and cattle, in the hands of a receiver appointed in a suit between J. and T., as partners. *Held*, that plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable; and that this must appear by a clear showing of plaintiff's right to the property and defendant's insolvency. *More v. Ord*, 15 Cal. 204.

258. Plaintiffs file their bill in equity to enjoin defendants from diverting a certain quantity of the water of Bear river, alleging that their right to one thousand inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes; that such quantity was necessary for their use, and that defendants had diverted the same, to their damage, etc. Plaintiffs had verdict and judgment for \$21,800 damages. *Held*, that the averments are insufficient to entitle plaintiffs to an injunction, the scope of the bill being simply to enforce in equity plaintiffs alleged right to one thousand inches of water, on the sole ground that it was adjudged as their right in the former suit. *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 145.

259. It is not sufficient that the affidavit should allege that the injury will be irreparable; it must be shown to the Court how and why it would be so, otherwise the extraordinary remedy of injunction will not be allowed, especially where no action has ever determined the plaintiff's right. *Waldron v. Marsh*, 5 Cal. 119.

260. In a bill for an injunction, the mere allegation of great and irreparable injury to a vested right is insufficient; the facts stated must satisfy the Court that the apprehension of such injury is well founded. *Branch Turnpike Co. v. Board of Supervisors of Yuba County*, 13 Cal. 190.

261. When a complaint, in an action to restrain the commission of trespasses, avers that the defendant has torn down the fences of plaintiff, and entered his close for the purpose of opening a private road across plaintiff's land, under a claim of right founded on an order of a Board of Supervisors laying out a road, and does not state that the right has been settled in an action at law, and that the defendant continues his acts after a Court of law has decided against him, it does not state facts sufficient to constitute a cause of action. *Leach v. Day*, 27 Cal. 643.

262. A complaint to enjoin the sale of property under an execution, and the issuance of another execution on the judgment, is devoid of equity, which only avers that the judgment and execution are void on their face, and the insolvency of one of the defendants. *Sanchez v. Carriaga*, 31 Cal. 170.

263. If, as contended in this case, a judgment by default be void because of the absence of the seal of the District Court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the sheriff of the service of summons and copy of complaint, or because of irregularities of the clerk in entering the judgment the District Court can quash the execution issued on such judgment, and injunction to restrain the enforcement thereof does not lie. *Logan v. Hillegass*, 16 Cal. 200.

264. If such judgment be not void, but merely irregular, because of the defects named, and the defects can be reached by motion before judgment, or on appeal, then the complaint here to enjoin the enforcement of the judgment should aver that plaintiff has paid the claim, for the recovery of which the action was brought, or that he has a valid defense to the same. *Id.*

265. Judgments, how pleaded.—See post, § 59.

266. Label.—See post, § 62.

267. Malicious prosecution.—In an action for malicious prosecution, only the substantial matter constituting the action, that is, facts, and not the evidence of facts, need be set out. *Dreux v. Domec*, 18 Cal. 83.

268. An action of conspiracy for unjustly prosecuting a party also lies, but probably differs in form at least from an action for malicious prosecution. The gist of an action of conspiracy is the "conspiracy"—the combining of two or more to do an unlawful and injurious act, and acquittal or termination of the prosecution is necessary to maintain the suit. *Id.*

269. In suit against three defendants for malicious prosecution, the complaint averred that "defendants contriving and maliciously intending to injure the plaintiff," etc., falsely, maliciously and without probable cause, procured him to be indicted for murder: *Held*, that the complaint sufficiently avers a joint agency on the part of defendants in instituting the prosecution. *Id.*

270. Mandamus.—A complaint in *mandamus*, against the comptroller, is bad if it fails to allege that there is "money not otherwise appropriated by law" out of which the compensation in question is to be paid. *Redding v. Bell*, 4 Cal. 333; see § 467, and authorities thereunder.

271. A statement in a petition for a writ of mandate that an election was held in a county to decide whether C. or S. should be the county seat, and that the Board of Supervisors canvassed the returns, and estimated the vote, and declared the result to be that S. had received a majority of the votes, is a sufficient averment that S. received a — majority of the votes cast. *Calaveras County v. Brockway*, 30 Cal. 325.

272. New promise, when to be alleged.—In actions upon written instruments for the payment of money, as promissory notes, the date being shown, shows the period when the right of action accrues. In such cases, any new promise which has been made, renewing or continuing the contract, should be alleged. *Smith v. Richmond*, 19 Cal. 481.

273. In an action to recover a debt against an insolvent which has been discharged, but revived by a new promise, the complaint is always upon the original demand, and nothing is alleged of the new promise. If the discharge is pleaded, the new promise may be given in evidence by the plaintiff. *Id.* 483.

274. Complaint avers in substance that defendant made his note, etc., setting out a copy, that plaintiff is holder by transfer from the payee, etc., and that de-

defendant is indebted to plaintiff therein in the sum, etc. The complaint then avers: "Plaintiff further shows that after said note was executed, etc., * * * defendant, by virtue of * * * proceedings in insolvency, etc., * * * claims to have been discharged from the payment of the note and debt hereinbefore mentioned; and plaintiff further shows that after said discharge aforesaid, on or about * * * defendant promised" the payee and other persons that he would pay said note to said payee on demand, etc.; and that defendant thereby revived said obligation, etc. *Held*, that the complaint does not set up two causes of action; that the gravamen of the action was designed to be the promise, the previous indebtedness being averred as matter of inducement. *Smith v. Richmond*, 15 Cal. 501. See *post note*, No. 279.

276. **Promissory note or bill of exchange.**—In an action against the maker of a note, or the acceptor of a bill of exchange, in which the place of payment is fixed, it is not necessary to aver presentment at that place and refusal to pay. *Montgomery v. Tutt*, 11 Cal. 307.

277. A declaration is insufficient which treats the maker and guarantor of a note as joint makers, and contains no allegation of demand and notice. *Lightstone v. Laurencel*, 4 Cal. 227.

278. An indorser of a note payable on demand, no demand being made until thirteen months after the indorsement to plaintiff, is *prima facie*, not liable. The delay is unreasonable. In such case, facts to excuse the delay are an essential part of the complaint, and if not averred therein, it is insufficient. *Jerome v. Stebbins*, 14 Cal. 457.

279. In suits upon written instruments for the payment of money, if it appear from the complaint that the demand is barred, and plaintiff relies upon a new promise, renewing or continuing the contract, such new promise must be alleged. *Smith v. Richmond*, 19 Cal. 476. See *post*, No. 283.

280. A complaint in an action commenced after the death of the husband, on a note and mortgage executed by the husband and wife, during the life of the husband, does not state a cause of action, unless it aver that the husband in his lifetime failed to pay the note. *Brown v. Orr*, 29 Cal. 120.

281. In an action brought upon a promise made by the defendant to accept a draft which another might draw on him, it is not necessary to aver in the complaint that the promise was in writing. *Wakefield v. Greenhand*, 29 Cal. 597.

282. The point that the complaint fails to show a cause of action, because the copy of the note sued upon and therein contained is without a copy of any internal revenue stamp, is not tenable. *Hallock v. Jandin*, Oct. T., 1867.

283. A complaint upon a promissory note, the collection of which is barred by the Statute of Limitations, contains a cause of action, if it alleges that the defendant has some time within four years of the day the suit was commenced "in writing, acknowledged and promised to pay the note." Such allegation imports that the defendant signed his name to the writing. *Porter v. Elam*, 25 Cal. 292.

284. If the complaint in a suit on a note avers that the defendant made and delivered the note to the plaintiff, and that the plaintiff is still the owner and holder, the allegation that plaintiff is the owner and holder is but a conclusion of law, and an answer denying it, but admitting the other allegations of the complaint, raises no material issue. *Wedderspoon v. Rogers*, 32 Cal. 569.

285. In a complaint upon a promissory note, an allegation of its non-payment is material, and, if omitted, the complaint is demurrable. The averment that there is a certain amount due upon the note is insufficient, being a statement of a mere conclusion of law. *Frisch v. Caler*, 21 Cal. 71.

286. If the original note offered in evidence contains an abbreviation for the word "administratrix," and specifies the rate of interest in figures only, and the copy in the complaint gives the word in full and states the rate of interest in words as well as figures, the variance is immaterial. *Corcoran v. Doll*, 32 Cal. 82. In a complaint on a promissory note, it is not necessary that a consideration should be specially alleged. If there is no consideration, the defendant should set up the want of it as a defense. *Winters v. Bush*, Oct. T. 1867.

287. **Quieting title to lands.**—In an action to quiet title against parties

claiming from the same source of title through a prior unrecorded conveyance, it is necessary to aver want of notice of the conveyance. *Lawton v. Gordon*, Oct. T., 1867. A complaint is demurrable if it does not state that the plaintiff was in possession at the time of the commencement of the action. *Praha, d. et al. v. Jefferson G. & S. Mining Co.*, Jan. T., 1868; *Brooks v. Calderwood*, Jan. T., 1868. See *post*, § 254.

288. *Replevin*.—A complaint in replevin, alleging that F. was seized and possessed of certain premises at the time of his death; that the plaintiffs were appointed the executors of his last will and testament, and ever since their appointment have been in the possession of the premises; that certain persons, whose names are not designated, entered upon the same without authority, and cut down timber growing thereon, to the amount of about three hundred cords; that the defendant afterwards also entered upon the premises without authority, and removed the wood thus cut, and still detains it from the plaintiffs; that they have demanded the possession of the same from him, and that he refuses to deliver it to them, to their damage of \$1,000—the alleged value of the wood—sufficiently shows plaintiffs' ownership of the wood. *Hallock v. Mizer*, 16 Cal. 574.

289. The averments, in such complaint, of "unlawful and wrongful," as applied to the entry upon the premises and the cutting down of the timber, and to his removal and detention of the same, may be stricken out as surplusage. *Id.*

290. The complaint averred that defendant wrongfully took and detained from one Johnson certain county warrants owned by the latter; that subsequently Johnson assigned to plaintiff his right in the warrants and the moneys which might be made by the same; and, that after this assignment, plaintiff demanded the warrants from defendant, who refused to deliver them. *Held*, that this complaint stated a sufficient cause of action; that as assignee of Johnson, plaintiff was entitled to recover the warrants or their value, with damages for their detention, accruing after the assignment. *Lasard v. Wheeler*, 22 Cal. 139.

291. *Sheriff*.—A complaint against a sheriff and his sureties for selling under execution the homestead of plaintiffs, which sets out that the sheriff was in possession of a certain execution against plaintiff, J. Kendall, and under color of said execution wrongfully and illegally entered upon and sold certain property, the homestead of plaintiffs, and averring damages in the sum of \$2,000, the value of the property, is insufficient, as the same does not state facts sufficient to constitute a cause of action. No damage has, or can result from such a sale. If the property sold was a homestead, the sheriff's deed conveyed nothing. The purchaser at sale could acquire no right to the property, nor could the plaintiff suffer any injury. *Kendall and Wife v. Clark*, 10 Cal. 17.

292. In an action against a sheriff to recover property seized under process, or its value, by the owner, it is necessary that the plaintiff should show affirmatively notice and demand before bringing suit, otherwise he cannot recover in such action. *Kitley v. Scannell*, 12 Cal. 73. See 30 Cal. 190; *post*, § 218, *note*.

293. A complaint in an action against a sheriff and his sureties for an alleged trespass of the sheriff, should allege that the bond was the sheriff's official bond, and set out enough of its contents to show that those who signed it were bound to indemnify parties injured by the sheriff's malfeasance. *Ghiradelli v. Bourland*, 33 Cal. 585.

294. If the complaint in an action against a sheriff and his official bondsmen alleges only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, there is a misjoinder of causes of action. *Id.*

295. A complaint in an action against a sheriff and his sureties for an alleged trespass of the sheriff, which merely avers that the sureties are the securities on his official bond, and that the same was duly filed, executed and recorded, does not state a cause of action on the bond. *Id.*

296. In trespass for taking goods, against a sheriff who justified under a writ of attachment against a third person, he called as a witness his deputy, who stated that he served the attachment, and related certain conversations between himself and the plaintiff. On cross-examination he stated that "he was deputy

sheriff, and under bonds to the sheriff." Whereupon plaintiff moved to strike out his testimony on the ground of interest. *Held*, that the motion was properly denied, as from the answer it was not certain that the character of his bonds was such as to make interested. *Twedy v. Ellis*, 22 Cal. 650.

297. *Sheriffs, actions against*.—See *post*, § 218.

298. *Slander*.—See *post*, § 62.

299. *Statutory privilege must be alleged*.—When a pleader wishes to avail himself of a statutory privilege the right given by particular facts, he must show the facts. *Dye v. Dye*, 11 Cal. 163.

300. *Statute of fraud, how pleaded*.

301. In an action brought upon a promise of the defendant to answer for the debt or default of another, it is not necessary in the complaint to aver that the promise was in writing. *Wakefield v. Greenwood*, 29 Cal. 597.

302. *Statute of limitation, how avoided*.

303. Facts taking a case out of the provisions of the statute of limitation must be specially set out in the complaint. *Wormouth v. Hatch*, July T., 1867.

304. Under our system, the rule is the same in law and equity; and if it appear upon the face of the complaint that the action is barred, and no facts are alleged taking the demand from the operation of the statute, the complaint is defective and demurrer lies. *Smith v. Richmond*, 19 Cal. 476.

305. If plaintiff alleges fraud to have been committed more than three years before the commencement of his action to bring himself within the exception of the statute, he must allege the fact of a discovery of the fraud at a period bringing him within the exception. *Sublette v. Stunney et al.*, 9 Cal. 423; *Boyd v. Blankman*, 29 Cal. 20; *Carpentier v. City of Oakland*, 30 Cal. 444.

306. *Statutes, private, how pleaded*.—See *post*, § 61.

307. *Taxes*.—In an action for the collection of delinquent taxes, under the Act of May 17th, 1861, the complaint must aver the fact of the failure of the tax collector to collect the delinquent tax, by his reason of his inability to find, seize, or sell property belonging to the delinquent. A complaint which fails to make this averment shows no cause of action. *People v. Pico*, 20 Cal. 595.

308. A complaint under the Act of May 17th, 1861, which avers that the tax "was levied upon and assessed against personal property," contains no cause of action. The complaint should not only aver that the tax was levied upon and assessed against personal property, but also the kind or kinds of personal property. *People v. Holladay et al.*, 28 Cal. 300.

309. In an action brought by the people to recover judgment for delinquent taxes assessed during the three years preceding March 1st, 1861, the complaint is fatally defective if it does not aver that the tax collector has failed to collect the taxes in question by reason of his inability to find, seize, or sell property belonging to the delinquent. *Id.*

310. If an assessment of a tax made during the three years preceding March 1st, 1861, is defective, in not stating the kind and quantity of property assessed, whether real or personal, or if real, in not giving its description, the pleader, in an action brought to recover judgment for such tax, may, if the same can be ascertained, insert in his complaint the necessary averments as to kind and quantity or description. *Id.*

311. *Assessments*.—See *Himmelman v. Danos*, April T., 1868.

312. *Trespass*.—Action for damages against defendants, averring that they "with force of arms, broke and entered" upon the premises of plaintiff, and damaged them, by causing them to be overflowed and covered with earth, gravel, tailings, etc., deposited thereon by the action of running water: *Held*, that under our system of pleading, the words "with force and arms, broke and entered," do not confine the proof to the direct and immediate damages, as in the old action of trespass, and the facts being clearly set out in the complaint, an addition of these words was surplusage. *Darst v. Rush*, 14 Cal. 81.

313. Possession in the plaintiff is sufficient to enable him to maintain trespass, and, although a higher title may be attempted to be set up, the failure to sustain it will not operate against the right to recover damages. *McCarron v. O'Connell*, 7 Cal. 152.

314. Where the complaint in an action of trespass asks, also, for the equitable interposition of the Court, if the law and equity are inseparably mixed together it would be demurrable. But it is not necessary that there should be express words, showing where the declaration in trespass leaves off, and the bill in equity begins. *Gates v. Kieff*, 7 Cal. 124.

315. Trover.—The conversion is the gist of the action of trover, and without conversion neither possession of property, negligence nor misfortune, will enable the action to be maintained. *Rogers v. Huie*, 2 Cal. 571.

316. To render defendant liable to the action, he must have converted the property to his own use; and if not, then any other act to amount to a conversion, must be done with a wrongful intent, either expressed or implied. *Id.*

317. A complaint (where there is more than one plaintiff) in an action to recover damages for the alleged seizure of goods, which avers that the defendant took and carried away "certain goods, chattels and effects, of and belonging to the said plaintiffs," does not necessarily aver a joint ownership of the goods in the plaintiffs; but would be sustained by proof that the plaintiffs owned the property as partners, or as tenants in common, and that their respective interests therein were very unequal. *Felberg v. Gorham*, 23 Cal. 349; see also 10 Cal. 520.

318. Undertakings, statutory bonds.

319. Bond.—Where the condition of a bond is to pay the debt of another, the condition operates merely by way of defeasance; and, if a defendant chooses to put his obligation in that form, he elects to be originally liable. A bond should be sued on, setting out breaches and damages. Assumpsit on the condition would be had on demurrer. *Baker v. Cornwall*, 4 Cal. 15.

320. If a bond has to be executed by the plaintiff, and is executed to the defendant by a wrong name, the latter has his remedy, and may describe it as given to him, and may show that he was the party intended. *Morgan v. Thrift*, 2 Cal. 562.

321. No averment of notice to the defendant is requisite in the complaint where the matters assigned as breaches lie as much in the knowledge of the one party as of the other. *People v. Edwards*, 9 Cal. 286.

322. A complaint, in an action upon statutory undertaking, which contains no other description of the instrument than an allegation that it corresponds with the provisions of a certain section of the Practice Act, is defective. The defect, however, being of form rather than of substance, objection to it must be taken by demurrer to the complaint. *Mills v. Gleason*, 21 Cal. 274.

323. Appeal bond.—An averment in the complaint in a suit on an appeal bond, that execution had been issued on the judgment and returned unsatisfied, is unnecessary. The non-payment of the judgment can be shown without issuing an execution. *Tissot and Wife v. Darling*, 9 Cal. 278.

324. Attachment.—In suit on a statutory undertaking, given to release property attached, and reciting the fact of a levy of the writ, the complaint need not aver or set out the facts which authorized the issuing of the attachment. The recital of the levy estops defendants from denying it, and the levy is sufficient without averment of the previous proceedings. *McMillan v. Dow*, 18 Cal. 339.

325. Where defendant in attachment applies to the Court, under sections one hundred and thirty-six and one hundred and thirty-seven of the Practice Act for a discharge of the attachment, and an undertaking is executed by D. & R., reciting the fact of the attachment, and that, "in consideration of the premises, and in consideration of the release from attachment of the property attached as above mentioned," they undertake to pay whatever judgment plaintiff may recover, etc., and the Court makes an order discharging the writ and releasing the property: *Held*, in suit against the sureties on the under-

taking, that the complaint need not aver that the property was actually released and delivered to the defendant; that as the consideration for the undertaking was the release of the property, and as the complaint avers such release in consequence and in consideration of the undertaking, by order of the Court, which is set out, the actual release and re-delivery of the property to defendant is immaterial, the plaintiff having no claim on it after the undertaking was given and the order of release made. *Id.*

328. In an action on a bond given to release property from attachment, the complaint should state that the property was released upon the execution and delivery of the bond. To charge the obligors, it is necessary to state the consideration of the undertaking; and a mere reference to the condition of the bond itself, wherein such release is stated as a consideration, is insufficient. *Palmer v. Melvin*, 6 Cal. 651.

327. In an action on an undertaking executed to release property from attachment, the complaint should allege that the property attached was released upon the delivery of the undertaking. *Williamson v. Blatten*, 9 Cal. 500.

328. Injunction bond.—In the action against the sureties on an injunction bond, the condition of which is, that the plaintiffs in the suit for whom the sureties undertook should pay all damages and costs that should be awarded against the plaintiff by virtue of the issuing of said injunction by any competent Court, and the complaint did not aver that any damages had been awarded: *Held*, that such complaint is fatally defective. *Turpey v. Schlenberger*, 10 Cal. 390.

329. A sheriff had in his hands money belonging to L., which he had collected on an execution in favor of L. and D., and against S. W. and C. commenced an action against M., L. and others, to enjoin M. from paying the money to L., and procured a preliminary injunction, which was served on M. alone, but L. appeared in the action and defended. The injunction bond ran to all the defendants. *Held*, that L. could maintain an action for damages on the injunction bond. *Lally v. Wise*, 28 Cal. 540. See *post*, § 115.

330. Official bond.—An action on the official bond of a constable lies primarily upon breach of the condition of the bond, whether the injury for which suit is brought be a trespass or not, the result of the nonfeasance or misfeasance of the officer. *Van Pelt v. Littler*, 14 Cal. 194.

331. An averment in a complaint on a county treasurer's official bond that he received money belonging to the county and retains it, and refuses to deliver it to his successor in office, is a sufficient averment of a breach of its conditions. *Mendocino County v. Morris*, 32 Cal. 145.

332. In an action on an official bond of a county treasurer, if the complaint avers only a breach by a failure of the treasurer to keep the money in the county safe, and by a withdrawal of the same and conversion to his own use, a recovery cannot be had for a failure of the treasurer to pay into the treasury his commissions retained on payments made to the State. *Sacramento County v. Bird*, 31 Cal. 66.

333. If the complaint on an official bond avers the due execution of the same by both principal and sureties, and the answer takes issue on the averment, and verdict and judgment are for plaintiff, the judgment will not be disturbed on appeal upon the judgment roll on the ground that what purports to be a copy of the bond annexed to the complaint does not contain the signature of the principal. *Mendocino County v. Morris*, 32 Cal. 145.

334. If there is a defect in an official bond by the failure of the principal to place a seal opposite his name, the defect will not defeat a recovery thereon as against the sureties, if the defect is suggested in the complaint. *Sacramento County v. Bird*, 31 Cal. 66.

335. A complaint in an action against a sheriff and his sureties for an alleged trespass of the sheriff, which avers that the other defendants than the sheriff are the securities on his official bond, does not state a cause of action against the sheriff on the bond. *Ghirardelli v. Bourland*, 32 Cal. 565. See *post*, § 40, No. 48, 50.

336. Replevin bond.—A complaint upon an undertaking given under

section one hundred and two of the Practice Act, which refers only to the section, without setting forth the material portions of the undertaking, is insufficient. *Mills v. Gleason*, Oct. 1861.

337. But the objection should be taken by demurrer, it being a defect rather of form than of substance. *Id.*

338. In an action against the sureties on an undertaking given in a replevin suit, where there has been a trial and judgment in the replevin suit, the complaint does not state facts sufficient to constitute a cause of action, unless it aver that the value of the property was found by the jury, and that an alternative judgment was rendered, as provided in section two hundred of the Practice Act. *Clary v. Rolland*, 24 Cal. 147. See further post, § 102, note.

339. Recognizance.—Recognizance in the form prescribed in section five hundred and twenty-three of the Criminal Practice Act, Hittell's Dig., art. 2110. The complaint alleged substantially that G. was indicted for gaming and arrested, and that then defendant executed the recognizance which is set out; that G. appeared at the first term of the Court thereafter and plead not guilty, and case continued to next term, at which time, the case being called for trial, G. did not appear, and the defendants, though "called," did not produce his body; that the Court then made an order forfeiting the recognizance, and that defendants did not produce the body of G. before the final adjournment of the Court. *Held*, on demurrer, that the complaint states a cause of action; that the objection that gaming being a misdemeanor, G. could appear by attorney, cannot avail, because there is nothing to show that he offered so to appear, even assuming that such matter could be here set up against the judgment of forfeiture in the Court of Sessions. *People v. Smith*, 18 Cal. 498.

340. A complaint in a recognizance in a criminal case should aver that the same was filed in or became a matter of record in the Court where it was returnable. *Mendocino County v. Lamar*, 30 Cal. 627.

341. Water, diversion of.—In an action of damages for diverting the water of a river from plaintiff's mill, an averment in the complaint of possession of the land and mill is sufficient against a trespasser, without averring riparian ownership or prior appropriation of the water. *McDonald & Blackburn v. Bear River and Auburn Water and Mining Co.*, 13 Cal. 220.

342. It is not necessary that the complaint should further allege an appropriation of the water, or an ownership thereof. *Leigh & Co. v. Ind. Ditch Co.*, 8 Cal. 323.

343. A complaint alleging that plaintiffs are the owners, and in possession of certain mining claims on a certain stream, and are entitled to the natural flow of the waters of the stream, which had been diverted to their injury by defendants, sets forth a sufficient cause of action. It is not necessary that the complaint should further allege an appropriation of the water, or an ownership thereof. *Id.*

344. In an action to recover damages for the diversion of the water of a stream from plaintiff's mills, an averment as to the precise quantity of water required for the use of the mills, and to which plaintiff claimed to be entitled, is an immaterial averment; and a recovery of damages would not establish plaintiff's right to the exact quantity of water claimed, so as to be *res judicata* in a subsequent suit. *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 145.

345. The union, in one count of a complaint, of an allegation, that defendants "have wrongfully built dams and flumes across said Mormon creek . . . so as to turn the water of said creek out of its natural channel," etc., and thus divert it from plaintiff, with an allegation that defendants "have constructed gates, etc., in their said dams and flumes, which they * * * hoist for the purpose of clearing out said dams and flumes of alum, stone and gravel," the accumulation of which renders the water useless to plaintiff, does not make the complaint demurrable, on the ground that it unites several distinct causes of action in one count. *Gale v. Tuolumne Water Co.*, 14 Cal. 25.

346. The gravamen of the action is the diversion of the water, and the fact that the diversion is accomplished by different means, is not important enough to require several counts. *Id.*

347. **Subdivision third**—Prayer for relief.—Objections to the prayer of a complaint cannot be taken by demurrer. If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief, and even in the absence of such clause, where an answer is filed. *Rollins v. Forbes and Wife*, 10 Cal. 239.

348. Although the prayer of a bill be inartificially framed, the Court will, under the general prayer for relief, disregard mistakes, and grant such relief as will conform with the bill. *Truebody v. Jacobson*, 2 Cal. 269.

349. Where a party, in his notice of motion served on the adverse party, asks for a specific relief, or for such other or further order as may be just, the Court may afford any relief compatible with the facts of the case presented. *The People v. Turner*, 1 Cal. 152.

350. When treble damages are given by a statute, the demand for such damages must be expressly inserted in the declaration, which must either recite the statute, or conclude to the damages of the plaintiff against the form of the statute. *Chipman v. Emeric*, 5 Cal. 239.

351. Where a suit is brought to test the question as to the priority of appropriation of water, a prayer for an injunction to prevent further injury is proper. *Marius v. Bicknell*, 10 Cal. 217.

352. Where a suit is brought to test the question as to the priority of appropriation of water, a prayer for an injunction, to prevent future injury, is proper. *Marius v. Bicknell*, 10 Cal. 217.

353. A complaint which sets out a cause of action in trespass, and concludes with a prayer for an injunction, is correct. *Gates v. Kieff*, 7 Cal. 125. See further, as to the importance of the prayer, § 147 *post*, *note*.

§ 40. When defendant may demur.

The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either,

1st, That the Court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2d, That the plaintiff has not legal capacity to sue; or,

3d, That there is another action pending between the same parties for the same cause; or,

4th, That there is a defect or misjoinder of parties plaintiff or defendant; or,

5th, That several causes of action have been improperly united; or,

6th, That the complaint does not state facts sufficient to constitute a cause of action; or,

7th, That the complaint is ambiguous, unintelligible, or uncertain.

Amended 1859, 139. N. Y. Code, § 144; Abb. Forms, No. 160, 709-715.

1. **First subdivision**.—A demurrer on the ground "that the Court has no jurisdiction either of the persons of the defendants or of the subject of the action," and "that the complaint does not state facts sufficient to constitute a cause of action," is sufficiently explicit, under the rule of construction adopted by the Courts of this State. *Ellissey v. Halleck*, 6 Cal. 386; *Willis v. Farley*, 24 Cal. 491.

2. Demurrer to the jurisdiction of a Court of general jurisdiction lies only

where the want of jurisdiction appears affirmatively on the face of the complaint. Otherwise, of Courts of limited and special jurisdiction—there, every fact essential to confer jurisdiction must be alleged. *Doll v. Feller*, 16 Cal. 432.

3. Second subdivision.—A county has a legal capacity to sue. *Placer County v. Asten*, 8 Cal. 305.

4. The fact that a vessel, lost while being towed out to sea, is insured, does not divest the owner of the right of action for her loss, and his recovery will bar another action for the same cause, and, therefore, the defendant cannot raise the objection that the action is not brought by the real party in interest. *White v. Maryann*, 6 Cal. 462.

5. Third subdivision.—Plaintiff cannot, after a plea in abatement of the pendency of a prior suit, avoid the effect of the plea by discontinuing the first action which was pending at the time of the plea. *O'Connor v. Blake*, Jan. T. 1865.

6. In an action to quiet plaintiff's title to land, alleged to be clouded by defendants giving out that the title is in themselves and not in plaintiff, an action of ejectment pending, in which the defendant does not ask for affirmative relief, is not available as a defense. *Ayres v. Bensley*, 32 Cal. 620.

7. Fourth subdivision.—Where a defect of parties is apparent upon the face of the complaint, the objection must be taken by demurrer, or the same will be waived. *Dunn v. Tozer*, 10 Cal. 167; *Mott v. Smith*, 16 Id. 557; *Sampson v. Shaffer*, 3 Id. 202; *Warner v. Wilson*, 4 Id. 313; *Beard v. Knox*, 5 Id. 257; *Tissot v. Throckmorton*, 6 Id. 473; *McKeene v. McGarvey*, 6 Id. 498; *Barrroughs v. Lott*, 19 Cal. 125; *Barber et al. v. Reynolds*, Oct. T. 1867.

8. Where the defendants demurred to a complaint for a misjoinder of parties plaintiff, and the Court overruled the demurrer, and the plaintiffs then moved to amend the complaint by striking out the names of the plaintiffs thus alleged to be improperly joined, and the defendants resisted successfully such motion: *Held*, that such action on the part of defendants was a waiver of the objection of misjoinder raised by their demurrer. *Summers v. Parish*, 10 Cal. 347.

9. The objection that a wife is improperly joined with the husband as party plaintiff should be taken advantage of by demurrer, and comes too late on appeal. *Tissot v. Throckmorton*, 6 Cal. 471.

10. An action brought by husband and wife against a steamer for breach of a contract to carry the wife to New York via Nicaragua, the alleged breach consisting in carrying the wife to Panama, and causing her detention there, and consequent illness, and other injuries, though based on a contract, sounds in tort, and the wife is a proper and necessary party plaintiff. *Warner and Wife v. Steamer Uncle Sam*, 9 Cal. 697.

11. Where the defendant, as sheriff, collects money on an attachment more than sufficient to satisfy the attaching creditor, and, after the expiration of his term of office, another attaching creditor attaches the surplus, and seeks to make the ex-sheriff liable therefor on his official bond: *Held*, that the demurrer to the complaint was properly sustained, as there was no relation between the defendant and plaintiff to render defendant officially liable. *Graham v. Endicott*, 7 Cal. 144.

12. A demurrer to a complaint on the ground "that the complaint does not state facts sufficient to constitute a cause of action," and which then specifies that the complaint shows no joint cause of action in the plaintiff, and that it prays for a judgment in favor of three plaintiffs for an injury done to one, is a good demurrer for misjoinder of parties. *Summers v. Parish*, 10 Cal. 347.

13. Where the parties joined as plaintiffs are all interested in the principal question raised in the bill, and the issues tendered are simple, and a multiplicity of suits may be avoided, a demurrer for multifariousness will not be sustained. *People v. Harrill*, 26 Cal. 360.

14. A misjoinder of parties plaintiff must be objected to by demurrer or answer, and cannot, in the absence of such objection, be made a ground for nonsuiting such of the plaintiffs as show themselves entitled to recover. *Rove v. Baciaguppi*, 21 Cal. 633. See further *post*, § 46, note No. 172.

15. Fifth subdivision.—Suit on a recognizance given before a Justice for

now that H.'s executor is offering the same for sale, and plaintiff prays for an injunction, and damages for the occupation: *Held*, that the complaint does not state facts sufficient to constitute a cause of action. *O'Conner v. Corbett*, 3 Cal. 371.

43. The statute does not require an allegation in the complaint of possession. An averment that the premises are unlawfully withheld from plaintiff is somewhat general, yet not insufficient, in a Justice's Court, except upon demurrer. *Cronise v. Carghill*, 4 Cal. 122.

44. In an action to recover damages, by the owner of a licensed ferry, against a party alleged to have run a ferry within the limits prohibited by law, it was held that the complaint should have alleged that defendant ran his ferry for a fee or reward, or the promise or expectation of it, or that he ran it for other than his own personal use or that of his family; and the omission of those allegations was fatal. *Hanson v. Webb*, 3 Cal. 237.

45. Where the payment of a promissory note is, by agreement of parties, made conditional upon the payment by the payee of a certain debt of the payor, such payment is a condition precedent to plaintiff's right to recover on the note, and must be averred in the complaint to have been made, or it is demurrable. *Rogers v. Cody*, 8 Cal. 324.

46. A complaint, alleging that the defendants sold to plaintiffs a certain share of fruit growing in an orchard, and after the sale executed a warrantee that the share of plaintiffs should be at their disposal, and further alleging a demand for the same, and the refusal of the defendant to deliver, is demurrable, as it should have contained an assignment of the breach of the contract or guaranty. *Dobovich v. Emeric*, 7 Cal. 109.

47. Objections to the prayer of the complaint cannot be taken by demurrer. *Rollins v. Forbes*, 10 Cal. 299.

48. **Seventh subdivision.**—If the complaint on an official bond in a suit against the principal and his sureties, and a copy of the bond is annexed to the complaint, which does not contain the signature of the principal, the complaint is good, unless demurred to specially for being ambiguous in this respect. *Mendocino County v. Morris*, 32 Cal. 145.

49. A complaint in ejectment which avers that, on a day named, "the plaintiff was, and ever since has been, and still is, the owner in fee simple, seized and possessed," etc.; "that, on a day thereafter named, and while the plaintiff was so the owner in fee simple, seized and possessed, defendants entered and ousted him, and from thence hitherto have and still do withhold the same," etc., is good, unless demurred to on the ground that it is ambiguous, unintelligible and uncertain. *Brown v. Martin et al.*, 25 Cal. 88.

50. A complaint in an action on the bond given by a tax collector, as collector of taxes of Yuba county, is not ambiguous and uncertain because it does not aver that any of the money sued for was collected by the tax collector on account of foreign miners' licenses. *People v. Love et al.*, 25 Cal. 526.

51. A demurrer to a complaint for ambiguity and uncertainty should point out specially in what the ambiguity or uncertainty consists, or it will be disregarded. *Blanc v. Klumpke*, 29 Cal. 156.

52. **Demurrer to whole complaint, where bad.**—A demurrer to the whole declaration, when some of the counts are good, should be overruled. *Whiting v. Heslep*, 4 Cal., 327; *Young v. Pierson*, 1 Cal. 448; *Weaver v. Conger*, 10 *Id.* 233.

53. If a complaint contains several counts, and the defendant demur to the whole complaint, the demurrer should be overruled if there is one good count in the complaint, although the other counts may be bad. *Stoddard v. Treadwell*, 26 Cal., 294.

54. If a demurrer is to the whole bill, and is good as to a part, but bad as to part, it should be overruled. *People v. Morrill*, 26 Cal. 360.

55. Where the complaint contains two counts, and there is a demurrer to one count only, and the demurrer is sustained, the plaintiff is entitled to judgment on the other count, if no answer has been filed. *Barber v. Casala*, 30 Cal. 92.

56. **Demurrer, what it admits.**—A demurrer admits the truth of such facts as are issuable and well pleaded; but it does not admit the conclusions which counsel may choose to draw therefrom, although they may be stated in the complaint. *Branham et al. v. Mayor and Common Council of San Jose et als.*, 24 Cal. 602. *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.

57. **Demurrer, when waived.**—Where a demurrer to the complaint is put in and overruled, and the defendant then answers, the answer is a waiver of the demurrer. *De Boom v. Priestly*, 1 Cal. 206.

58. **Demurrer, should not state facts.**—A statement of facts in a demurrer is not admissible. The only office of a demurrer is, to raise issues of law upon the facts stated in the pleading demurred to. *Cook v. De La Guerra*, 24 Cal. 239.

59. **Demurrer, must specify the grounds of objection.** § 41.

60. **Demurrer, when it will not lie.**—A declaration setting forth that plaintiff had purchased a quantity of goods from W. & P., "then and there acting as agent of the defendant," is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer. *Cochran v. Goodwin*, 3 Cal. 245.

61. In an action for the breach of a contract, the want of any averment of special damage, cannot be reached by demurrer. Such averment is only necessary where the right of action itself depends upon the special injury received. For the breach of contract an action lies, though no actual damage be sustained. *McCarthy v. Beach*, 10 Cal. 461.

62. It is no ground of demurrer to a complaint that the christian name of one of the plaintiffs does not appear. *Nelson & Doble v. Highland*, 13 Cal. 74.

63. Objections to a declaration, when they arise from matters of form, are not the subject of a demurrer. *Ottero v. Bullard*, 3 Cal. 188.

64. Objections to the prayer of a complaint cannot be taken by demurrer. If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief, and even in the absence of such clause when an answer is filed. *Rollins v. Forbes and Wife*, 10 Cal. 299.

65. Where a complaint, filed to compel a partnership account, contained sufficient to call upon defendants for an account as to a particular branch of their business, but was in other respects inartificially drawn and insufficient, and a demurrer was put in to the whole complaint: *Held*, that the demurrer must be overruled. *Young v. Pearson*, 1 Cal. 448.

66. In a suit by a physician against a county on a contract for his services for one year as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, cannot be taken by demurrer, unless the demurrer distinctly present the objection. *McDaniel v. Yuba County*, 14 Cal. 444.

67. Where a bill alleges a parol trust, it seems that it must be denied; and a general demurrer will not lie. *Peralta v. Castro*, 6 Cal. 354.

68. **What is or not a demurrer.**—An allegation in an answer that the debt sued for, if due at all, is due to plaintiff and another, as partners, cannot be treated as a demurrer. *Andrew v. Mokelumne Hill Co.*, 7 Cal. 330.

69. **Statute of Limitations.**—When it appears upon the face of a bill in equity that the suit is barred by lapse of time, the defendant may demur. *Sublett v. Tinney*, 9 Cal. 423.

70. In an action for relief on the ground of fraud, the fraud is the substantive cause of action, and not the discovery. If, therefore, the plaintiff alleges the fraud to have been committed more than three years before the commencement of his action, his cause of action is barred, and his complaint is demurrable. *Id.*

71. Where a complaint shows *prima facie* upon the facts stated that the claim or debt upon which suit is brought is barred by the Statute of Limitations, the defendant may take advantage of the defect by demurrer. But

where the complaint does not directly show *prima facie* a case for the operation of the statute, a demurrer cannot be sustained on this ground. This is the chancery rule, under the English system, and as our pleadings approximate more nearly to the chancery than the common law form, we have adopted the former. *Barringer v. Warden*, 12 Cal. 311.

72. Although demurrer lies when the facts stated in the complaint show the action to be barred by the Statute of Limitations, the bar of the statute must clearly appear. *Ord v. De La Guerra*, 18 Cal. 67.

73. The defense of the Statute of Limitations is a personal privilege of the debtor, which he may assert or waive at his option; but it must be set up in some form, either by demurrer or answer, or it will be deemed to have been waived. *Grattan v. Wiggins*, 23 Cal. 16.

74. It should be distinctly stated in the demurrer. *Brown v. Martin*, 25 Cal. 89; *Farwell v. Jackson*, 28 Cal. 106.

75. Under our system the rule is the same in law and equity; and if it appear upon the face of the complaint that the action is barred, and no facts are alleged taking the demand from the operation of the statute, the complaint is defective and demurrer lies. *Smith v. Richmond*, 19 Cal. 476.

76. If the demand be in truth barred, but the fact does not appear upon the face of the complaint, the defense must be made in answer. *Id.*

77. Generally.—When a demurrer is general to a complaint, Courts are not bound to notice defects which are mere matter of form. *Phelps v. Owens*, 11 Cal. 22.

78. An objection that securities sued on are not promissory notes must be taken advantage of on demurrer, and a demurrer having been filed without pointing out this defect, it must be considered waived. *Powell v. Ross*, 4 Cal. 197.

79. If every fact essential to the claim or defense be not stated, the adverse party may demur; and if any fact not essential to the claim or defense—in other words, any except *issuable facts*—be stated, the adverse party may move to strike out the unessential parts. *Green v. Palmer*, 15 Cal. 411.

80. There are six causes for which a demurrer may be interposed, under section forty of the Code (now seven causes), and unless a ground of demurrer be included under one or more of such causes, it cannot be sustained. *Hentsch v. Porter*, 10 Cal. 555.

81. A defect which will defeat the plaintiff's present right to recover, in whole or in part, is a good ground of demurrer. *Id.*

82. Objections to complaint, when deemed waived.—*Vide* § 45.

83. Objections not appearing on the face of the complaint, to be taken by answer. § 44.

§ 41. Demurrer must specify grounds of objection.

The demurrer shall distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so, it may be disregarded.

N. Y. Code, § 145.

1. A demurrer to the complaint for any reason except an objection to the jurisdiction of the Court, or that the complaint does not state facts sufficient to constitute a cause of action, must distinctly specify the grounds upon which any of the objections to the complaint are taken. *Kent v. Snyder*, 30 Cal. 666.

§ 42. Demurrer and answer.

The defendant may demur to the whole complaint, or to one or more of several causes of action stated therein, and

answer the residue ; or may demur and answer at the same time.

N. Y. Code, § 151.

1. An issue of law and fact should not be mixed in an answer. *Brooks v. Douglass*, 32 Cal. 208.

2. The defendant may demur and answer at the same time to the entire complaint, and also to each cause of action stated therein. *People v. McClam*, 31 Cal. 101.

3. Striking out answer for failure to pay demurrer fee.—If the defendant files his answer at the same time he does his demurrer, the Court, after overruling the demurrer, has no right to strike out an answer which raises a defense because the defendant fails to pay the plaintiff twenty dollars, required by a rule of Court to be paid for the privilege of answering when a demurrer is overruled. *Id.*

§ 43. *Amended complaint, how filed and served.*

If the complaint be amended, a copy of the amendments shall be filed, or the Court may in its discretion require the complaint as amended to be filed, and a copy of the amendments shall be served upon every defendant to be affected thereby, or upon his attorney, if he has appeared by attorney; the defendant shall answer in such time as may be ordered by the Court, and judgment by default may be entered upon failure to answer, as in other cases.

¹Amended 1854, 85; 1855, 196. See Rules XV, XXX, XXIV, San Francisco county.

1. When a demurrer is overruled with leave to answer, it is not necessary that the order fix the time within which the answer must be filed. The Court has power to fix such time for answering as it may deem proper; but where no time is fixed, the defendant should answer within the same time as in case of service of a copy of the original complaint. *People v. Rains*, 23 Cal. 128.

2. When the defendant is allowed time to answer until the plaintiff elects on which count of the complaint he will go to trial, the plaintiff should serve a copy of the complaint with the notice of his election. *Wilson v. Cleveland*, 30 Cal. 192.

§ 44. *Objection not appearing on complaint.*

When any of the matters enumerated in section forty do not appear upon the face of the complaint, the objection may be taken by answer.

N. Y. Code, § 147.

§ 45. *Objections, when deemed waived.*

If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

N. Y. Code, § 148.

1. The objection that there is a defect of parties to the complaint must be taken by demurrer or answer, or it will be deemed to have been waived; but the defendant may object on the trial, if the proof does not sustain plaintiff's allegations, as to his right of action. *Alvarez v. Brannon*, 7 Cal. 503.

2. Where an administrator does not set up his privileges by demurrer or answer, but suffers judgment to go by default, it is a confession that he is properly sued. *Hentsch v. Porter*, 10 Cal. 555.

3. Where a party sets up matter in his answer not recognized by law as a defense to the action, while the objection may be taken by demurrer, it is not waived by failure to demur, but may be taken advantage of at any time. *McDougall v. Maguire*, April T. 1868.

§ 46. 'Answer, what to contain.

The answer of the defendant shall contain :

First—If the complaint be verified, a specific denial to each allegation of the complaint controverted by the defendant, or a denial thereof according to his information and belief; if the complaint be not verified, then a general denial to each of said allegations; but a general denial shall only put in issue the material and express allegations of the complaint.

Second—A statement of matter in avoidance, a counter claim constituting a defense, or the subject matter of cross complaint, which may entitle a defendant to relief against the plaintiff alone, or against the plaintiff and a co-defendant.

¹Amended 1854, 85; 1860, 278; 1862, 562; 1866, 702; see *post*, §§ 50, 65; Bancroft's Forms, No. 482; Abb. Forms, Nos. 152-158, 717-753.

1. *First subdivision—specific denials.*—The rules of pleading, both under the old equity system and under our present system, are intended to prevent evasion, and to require a denial of every specific averment in a sworn bill, in substance and in spirit, and not merely a denial of its literal truth; and whenever the defendant fails to make such denial, he admits the averment. *Blankman v. Vallejo*, 15 Cal. 638.

2. A specific denial to each allegation of a complaint is a separate denial, applicable only to the particular allegation controverted. *San Francisco Gas Co. v. The City*, 9 Cal., 453.

3. The object of the Code was to narrow the proof upon the trial, and to accomplish this end, the plaintiff was allowed to verify his complaint, and thus compel the defendant to deny specifically each separate allegation. *Id.*

4. An answer to a verified complaint, which undertakes to deny material allegations, should contain a specific denial to each allegation controverted. *Fish v. Redington*, 31 Cal. 185.

5. *General denials.*—In a case of malicious prosecution, where the defendants filed a general denial, and also averred that they had nothing to do with the prosecution, except as witnesses, plaintiff filed a replication taking issue on this averment. *Held*, that if plaintiff chose to consider this a good defense, and join issue on it, defendants cannot complain; though, probably, this matter was put in issue by the general denial, and the replication was unnecessary. *Dreux v. Domec*, 18 Cal. 83.

6. Where the alleged fact is, from its nature, presumptively within the personal knowledge of the defendant, he cannot be permitted to answer on information and belief, but must answer in the form positive. And where,

from the nature of the fact alleged, the knowledge, if any, is presumptively on information, he is not bound to deny positively, but only "according to his information and belief;" but in such case he must answer according to both his information and belief. The word "belief," as used in the statute, is to be taken in its ordinary sense, and means the actual conclusion of the defendant drawn from information. *Humphreys v. McCall*, 9 Cal. 59.

7. Defendant can know what is his belief, and can therefore state it. This belief may be founded on the statement of others, not competent witnesses, and not under oath, etc. Yet, if the defendant has formed a belief from this source, he must state it. He cannot be the judge as to whether his information is legal testimony. *Id.*

8. The answer that the defendant, a municipal corporation, has no knowledge or information "in respect to the obligations of a count in a verified complaint, and therefore denies the same," is insufficient. *San Francisco Gas Co. v. the City*, 9 Cal. 453.

9. The statute imposes upon the defendant, if a natural person, and if a corporation, upon its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matter alleged in a verified complaint, to enable them to answer in the proper form. *Id.*; see *Brown v. Scott*, 25 Cal. 189, and authority then cited; *Fish v. Redington*, 31 Cal. 185.

10. In no case can the allegation of a verified complaint be controverted by a denial of sufficient knowledge or information upon the subject to form a belief. *Curtis v. Richards & Vantine*, 9 Cal. 33.

11. Under the system of practice in this State, a general denial is equivalent to the general issue at common law, and such a plea does not put in issue the plaintiff's title to one. *White v. Moses*, 11 Cal. 69; *Brooks v. Chilton*, 6 Cal. 640.

12. In an action under the thirteenth section of the act concerning forcible entries and unlawful detainer, a verified "general denial" is a sufficient denial of a complaint duly verified. *Sullivan v. Cary*, 17 Cal. 85.

13. Suit on a promissory note made by defendants. The complaint, not verified, sets out the note, and avers assignment thereof by payee to plaintiff. Answer, general denial. *Held*, that the answer does not admit, but denies the assignment, and hence, plaintiff must prove it, and is not entitled to judgment on the pleadings. *Hastings v. Dollarhide*, 18 Cal. 390.

14. **General denial qualified, insufficient.**—A general denial of the averments of a verified complaint with the qualifications of, "except as hereinafter admitted," is insufficient to put in issue any of its allegations. *Levinson v. Schwartz*, 22 Cal. 229.

15. **Material allegations only put in issue by a general or special denial.** A denial, whether general or special, only puts in issue the allegations of the complaint. The difference between a general and special denial in this respect is only in the extent to which the allegations are traversed. *Coles v. Boulaby*, 21 Cal. 47.

16. **Sufficient denial.**—Where the complaint averred a contract between plaintiff and the Board of Supervisors on behalf of the county, and the answer admitted a contract between the plaintiff and another on the one side, and the county on the other, and averred that this was the only contract made by the county in relation to the matter, and denied that any other was made by the Board of Supervisors: *Held*, that this denial was sufficient to put the plaintiff on proof of the contract. *Murphy v. Napa County*, 20 Cal. 497.

17. If an answer, in response to an allegation of the complaint, instead of denying it in express terms, contains the averment that the defendant did not commit the act charged, or that the facts alleged to exist do not exist, these averments of the answer traverse the matters alleged and are good denials of the same. *Hill v. Smith*, 27 Cal. 479.

18. Allegations of matters of evidence in a pleading are not issuable facts. If the answer puts in issue the ultimate facts resulting from the evidence, it is a sufficient denial. *Moore v. Murdock*, 26 Cal. 524.

19. A denial of the material allegations only is sufficient. *Racouillat v. Rene*, 21 Cal. 450. See § 50 post, note.

20. **Conclusions of law, not to be denied.**—If the answer merely denies the conclusions of law resulting from the facts averred in the complaint, it is insufficient to raise an issue, and the facts are deemed admitted. *Nelson v. Murray*, 23 Cal. 338.

21. A denial that the defendant became or was lawfully bound by a judgment declared on, is only a denial of a conclusion of law. *People v. Supervisors of San Francisco*, 27 Cal. 655.

22. The denial of any indebtedness, without a denial of any of the facts from which that indebtedness follows, as a conclusion of law, raises no issue. *Curtis v. Richards et al.*, 9 Cal. 33; *Wells v. McPike*, 21 Cal. 215.

23. So of an answer which states in general terms that an ordinance passed by a municipal corporation, is illegal and void. *Id.* "Owner and holder" conclusion of law. *Wedderspoon v. Rogers*, 32 Cal. 569. See § 39, Nos. 42-50.

24. **Allegations anticipating a defense need not be denied.**—The complaint stated a cause of action for goods sold, and, in addition, with a view to meet a probable defense of payment based upon the giving of certain notes by defendant and a receipt in full by plaintiff, stated the making of the notes and receipt, and alleged facts attending the transaction, which, if true, avoided its effect as payment by reason of fraud and misrepresentation on the part of defendant. The answer admitted the original demand and averred payment by the notes referred to in the complaint, but did not deny in proper form the allegations in the complaint respecting the fraud of defendant in the transaction. The case was submitted in the pleadings and plaintiff had judgment. *Held*, that the judgment was erroneous; that the allegations of the complaint in reference to the transaction, claimed to operate as payment, were not material allegations requiring a denial, and were not therefore admitted by the failure of defendant to deny them. *Canfield v. Tobias*, 21 Cal. 349.

35. **Insufficient denials.**—Where a complaint, in an action on a promissory note, executed by two defendants, averred that the defendants were partners, and that the note was executed by them, and the answer simply denied that the defendants were partners, and did not deny that they executed the note: *Held*, that the averment of partnership was immaterial, and that plaintiff was entitled to judgment on the pleadings. *Whitehall v. Thomas*, 9 Cal. 499.

36. A plea, professing to answer the whole complaint, but in fact only answering one of the two counts, is bad. This was the rule at common law, and it applies under our system. *Wallace v. Bear River Water and Mining Co.*, 18 Cal. 461.

37. Where the complaint, verified, avers that defendant is indebted to plaintiff for goods, wares and merchandise, sold and delivered, in the sum of eight hundred and twenty-eight dollars and sixteen cents, and the answer denies that defendant is indebted in the sum of eight hundred and twenty-eight dollars, sixteen cents, as is set out in said complaint: *Held*, that the denial is insufficient. *Higgins v. Wortell*, 18 Cal. 330. See *Woodworth v. Knowlton*, 22 Cal. 164.

38. Where, in an action on a lost note, a verified complaint alleges that on a particular day the note in question was made by defendant, and delivered to plaintiff, an answer denying the making and delivery of the note on the day mentioned is insufficient. Such denial does not reach the substantial matter of the averment, and only raises an immaterial issue as to time. *Castro v. Wetmore*, 16 Cal. 379.

39. The denial of any indebtedness, without a denial of any of the facts from which that indebtedness follows as a conclusion of law, raises no issue. *Curtis v. Richards & Vantine*, 9 Cal. 33.

40. Where, in an action on a lost note, the complaint, verified, alleges the loss, stating particularly the circumstances thereof, an answer denying that the note was lost as alleged, does not put in issue the fact of loss, which is the gist of the averment, but only the circumstances of the loss, which are collateral and immaterial. *Castro v. Wetmore*, 16 Cal. 379.

41. In a suit on a note, the complaint containing the note, or a copy, a denial of indebtedness is no denial at all. *Kinney v. Osborne*, 14 Cal. 112.

42. Where a complaint is verified, an answer denying "generally and specifically each and every material allegation in the complaint, the same as if

such allegation were herein recapitulated," and also denying each allegation in the same form, with certain qualifications and exceptions, does not raise an issue upon any fact stated in the complaint. *Hensley v. Turtar*, 14 Cal. 508.

43. An allegation, in a verified complaint, that "defendants wrongfully and unlawfully entered upon and dispossessed" plaintiff, is not sufficiently denied by a denial that "defendants wrongfully and unlawfully entered and dispossessed plaintiff," because such denial admits entry and ouster. *Buenius v. Coffee*, 14 Cal. 91.

44. Where both complaint and answer are verified, the denial in the answer of an allegation in the complaint, in the following terms, is not sufficient, viz: "And the said defendants deny, for want of information to enable them to admit, the sale and transfer of said Georgia Ditch to them, plaintiffs, as alleged," etc. *Humphreys v. McCall*, 9 Cal. 59.

45. If the complaint, in an action to recover the possession of personal property, avers that the "plaintiff was the owner and in possession of the property," this averment is not traversed by an answer which denies that the "plaintiff was the owner and entitled to the possession of the property." *Richardson v. Smith*, 29 Cal. 529.

46. Nor is the allegation that the "defendant wrongfully took the property from plaintiff's possession, and from thence to the time the action was commenced, wrongfully detained the same property from him," traversed by an answer denying, "that the defendant at any time wrongfully took and detained the property from the plaintiff." *Id.*

47. If the answer does not traverse the material allegations of the complaint, and the new matter contained in it does not state facts sufficient to constitute a defense, and the pleadings are not verified, a closing denial, stating that "the defendants denying each and every allegation set forth in plaintiff's complaint not consistent with the foregoing answer," fails to raise any issue. *Id.*

48. If an answer merely denies what is non-essential in the averments of a complaint, it is an admission of all that is essential to a recovery. *Leffingwell v. Greffing*, 31 Cal. 231.

49. If the complaint avers that the defendant is indebted to the plaintiff in the sum of three thousand dollars gold coin, for so much money received by defendant for plaintiff's use, and the answer denies that the defendant received three thousand dollars in gold coin for plaintiff's use, it is only a denial of its receipt in gold coin, and does not raise an issue. *Id.*

50. If the complaint contains averments of the rendition of a judgment against the defendant, by a Court of competent jurisdiction, and states the character of the judgment, an answer denying that the defendant became or was lawfully bound by the judgment, is only a denial of a conclusion of law, and does not raise an issue of fact. If the judgment can be attacked collaterally, the answer must specify the points of its invalidity. *People v. Supervisors of San Francisco*, 27 Cal. 655.

51. If the complaint avers the passage of an ordinance by a municipal corporation, and the answer in reply states in general terms that the ordinance is illegal and void, no issue of fact is raised. *Id.*

52. An averment in a complaint that the defendant, since November, 1858, "has continued to possess and occupy said land and premises, and use the same in her said sole trader business," is not denied by a denial in the answer that defendant has continued since the 9th day of November, 1858, to occupy or use the said premises in her business as such sole trader. *Camden v. Mullen*, 29 Cal. 564.

53. An allegation in a sworn answer, that "on the 24th day of March, 1862, the said French and Robinson, by deed duly executed, acknowledged and recorded, conveyed said premises to this defendant for the sum of seven thousand seven hundred and fifty dollars," is not denied by a statement in the replication; that "the plaintiffs further deny that said French and Robinson, or either of them, conveyed said premises to the defendant for the sum of seven thousand, seven hundred and fifty dollars, or for any other sum." Such denial is a mere denial that French and Robinson conveyed the premises without denying the facts which constitute the conveyance; besides, it does not deny the convey-

ance—the material fact—but only a conveyance for a consideration. Under such denial, the party making such averment is not required to offer his deed in evidence on the trial. The allegation of the answer is deemed admitted under the provisions of the statute. *Landers et al. v. Bolton*, 26 Cal. 416.

54. Where the complaint avers that the defendant wrongfully and unlawfully took and carried away personal property, and the answer denies that defendant wrongfully and unlawfully took and carried it away, it is a confession of the taking and carrying away, and a denial merely of its wrongful character. *Lay v. Nevill*, 25 Cal. 549.

55. A denial that property sued for is of the exact value alleged in the complaint, is an admission of any lesser value. *Thurdy v. Ellis*, 22 Cal. 650.

56. If the pleadings are under oath, and the replications in response to a material averment of the answer undertakes to deny, by saying, "it is not true," etc., the replication is evasive, and does not specifically deny the averment. *Versan v. McGregor*, 23 Cal. 339.

57. Literal and conjunctive denials.—In this case, as the bond in the complaint answers to the description of the bond offered in evidence, and as the complaint avers that the mortgage was given to secure *this bond*—the denials in the answer being literal and conjunctive—the execution of the bond and mortgage was held to be admitted by the answer, as also that the mortgage was given to secure the debt evidenced by the bond. *Blankman v. Vallejo*, 15 Cal. 638; see facts stated.

58. Where the answer denied the allegations of indebtedness as to time, amount and work, in the very words of the complaint: Held, that the answer raised an immaterial issue upon these particulars, instead of meeting the substantial matter averred. *Caulfield v. Sanders*, 17 Cal. 569.

59. The rules of pleading, both under the old equity system and under our present system, are intended to prevent evasion, and to require a denial of every specific averment in a sworn bill, in substance and in spirit, and not merely a denial of its literal truth; and whenever the defendant fails to make such denial, he admits the averment. *Smith v. Richmond*, 15 Cal. 501.

60. Where the complaint, in replevin, averred that on a certain day plaintiff was the owner and in possession of the property, and that its value was \$1,000; and the answer denied that on the day specified "the plaintiff was the owner and lawfully in possession;" and, as to its value, averred that the defendant has no knowledge, etc., and therefore denies that it is worth \$1,000: Held, that the answer is insufficient, because it raises an immaterial issue as to time; and, as to the possession of the property, that it amounts merely to a conclusion of law. *Kuhland v. Sedgwick*, 17 Cal. 123.

61. Such an answer raises no issue as to the allegation of "possession," except in conjunction with the allegation of ownership, and as each of the allegations is sufficient to sustain the complaint, the issue presented by the conjunctive denial is irrelevant and immaterial. *Id.*

62. An answer which undertakes to deny averments as a whole, as conjunctively stated, is evasive, and an admission of the allegations thus attempted to be denied. *Fish v. Redington*, 31 Cal. 185.

63. In this case the complaint and answer are printed in the opinion, and a large number of authorities are cited on page 194.

64. If several averments in a complaint are conjunctively stated, an answer attempting to deny them, by repeating them in their conjunctive form, does not raise an issue. *Reed v. Calderwood*, 32 Cal. 109.

65. If an allegation of a complaint consists of several clauses or propositions connected by the copulating conjunction "and," a denial of the entire allegation is evasive and insufficient. Each proposition should be separately denied. *More v. Delvalle*, 28 Cal. 170.

66. Where several allegations of a complaint are not connected by the conjunction "and," a denial in the answer of these allegations, conjunctively, does not amount to a denial of the allegations to which the defendant professes to respond. *Fitch v. Bunch*, 30 Cal. 208.

67. Where an allegation in a verified complaint embraces several distinct propositions stated conjunctively, a denial in the answer, of the entire alle-

gation, following the language of the complaint, is insufficient and raises no issue. *Woodworth v. Knowlton*, 22 Cal. 164.

68. Thus, where the form of the allegation was that defendant "unlawfully and wrongfully seized and took said property into his possession from said plaintiff," and the denial was "that he (defendant) wrongfully and unlawfully seized, took, or carried away the said property: Held, that the fact that defendant took the property from the plaintiff, was not denied, but admitted. *Id.*

69. Denials on information and belief.—The denial as to value, being based on the want of knowledge or information, is insufficient. *Kuhland v. Sedgwick*, 17 Cal. 123.

70. If the complaint aver the recovery of a judgment against one of several defendants, the Court in which it was recovered, and the date and amount of the same, the defendants, in their answer, may deny the same upon information and belief. *Vassarut v. Austin*, 32 Cal. 597.

71. A specific allegation of a contract, in a verified complaint, is not sufficiently controverted by an answer stating that defendant has no knowledge or information respecting the same, and therefore denies the same, and no evidence of the contract would be necessary. *Ord v. Steamer Unole Sam*, 13 Cal. 369.

72. The allegation of the death of plaintiff's ancestor is a verified complaint, is not sufficiently controverted by the averment in the answer "that defendant has not sufficient knowledge to form a belief," and therefore neither admits nor denies. *Anderson v. Parker*, 6 Cal. 197.

73. Where the alleged fact is, from its nature, presumptively within the personal knowledge of the defendant, he cannot be permitted to answer on information and belief, but must answer in the form positive. And where, from the nature of the fact alleged, the knowledge, if any, is presumptively based on information, he is not bound to deny positively, but only "according to his information and belief;" but in such case, he must answer according to both his information and belief. The word "belief," as used in the statute, is to be taken in its ordinary sense, and means the actual conclusion of the defendant, drawn from information. *Humphreys v. McCall*, 9 Cal. 59.

74. Defendant can know what is his belief, and can therefore state it. This belief may be founded on the statement of others, not competent witnesses, and not under oath, etc. Yet, if the defendant has formed a belief from this source, he must state it. He cannot be the judge as to whether his information is legal testimony. *Id.*

75. The answer that the defendant, a municipal corporation, has no knowledge or information "in respect to the obligations of a count in a verified complaint, and therefore denies the same," is insufficient. *San Francisco Gas Co. v. The City*, 9 Cal. 453.

76. The statute imposes upon the defendant, if a natural person, and, if a corporation, upon its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matter alleged in a verified complaint, to enable them to answer in the proper form. *Id.*

77. In no case can the allegation of a verified complaint be controverted by a denial of sufficient knowledge or information upon the subject to form a belief. *Curtis v. Richards & Vantine*, 9 Cal. 83; *Id.* 453.

78. An allegation in an answer by an administrator that the defendant "avrs, on information and belief, that no such deed or deeds were ever executed," is a sufficient denial of an averment in the complaint that defendant's intestate executed and delivered the particular deeds referred to. *Thompson v. Lynch*, 29 Cal. 189.

79. Where the pleadings are verified, and the answer in response to a material allegation of the complaint denies the same upon information and belief, the denial is insufficient. *Nelson v. Murray*, 23 Cal. 338.

80. If the allegations of a verified complaint are presumptively within the knowledge of the defendant, a denial of the same in the answer, according to his best knowledge, information and belief, is evasive of the issue tendered. *Brown v. Scott*, 25 Cal. 194.

81. Where a material fact, stated in a verified complaint, is denied upon

information and belief, the answer should state how it happened that the defendant is without knowledge as to the fact averred. *Id.*

82. When the material facts alleged are presumptively within the knowledge of the defendant, he must traverse them if he undertakes to do so, or, must state how it is that he is without knowledge of such facts. *Vassault v. Austin*, 32 Cal. 597.

83. The recovery of a judgment is not presumptively within the knowledge of the defendant. *Id.*

84. A denial "on information and belief" is sufficient. It is not necessary to follow the precise words of the statute, by saying, "on his information and belief," etc. *Roussin v. Stewart*, Oct. T., 1887.

84. Defendant may crave oyer of a written instrument.—A written contract may be declared on according to its legal effect, or it may be set forth in *hæc verba*. If declared on according to its legal effect, the defendant may by the rule of common law in a proper case, crave oyer of the instrument, and if it appear that its provisions have been misstated, he may set out the contract in *hæc verba* and demur, on the ground of variance. *Stoddard v. Treadwell*, 26 Cal. 294.

85. Prayer.—In an action to recover personal property, to enable the defendant to obtain the value of the property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer, relative to the change of possession from defendant to plaintiff. The judgment of return or value is in the nature of a cross-judgment, and must be based upon proper averments. *Gould v. Scannell*, 13 Cal. 430.

If the plaintiff takes the property, the defendant must claim its return in his answer, to enable the Court to give the judgment in the alternative form. *Id.* See further, § 147, *post*.

86. Generally.—The defense, that the defendant acted by advice of counsel, must show that such advice was given upon a full and fair statement of the facts. *Bliss v. Wyman*, 7 Cal. 257.

87. When the defendants employed the plaintiff to superintend the erection of a building, of which he was one of the contractors, they cannot plead that it is against public policy that he should occupy two positions, of which the interests were in conflict, in defense of an action brought by him for services as superintendent. *Shaw v. Andrews & Hillyer*, 9 Cal. 73.

88. A plea professing to answer the whole complaint, but in fact only answering one of the two counts, is bad. This was the rule at common law, and it applies under our system. *Wallace v. Bear River W. and M. Co.*, 18 Cal. 461.

89. An answer is fatally defective if it does not deny any of the material allegations of a verified complaint, either positively or according to information and belief; the only forms in which the allegations of a verified complaint can be controverted so as to raise an issue. A denial in any other form is unknown to our system or practice, and cannot have any legal effect. *San Francisco Gas Co. v. The City*, 9 Cal. 453.

90. Second subdivision—new matter.—New matter is, where defendant seeks to introduce into the case a defense not disclosed by the pleadings—something relied on by him, but not put in issue by the plaintiff. *Bridges v. Paige*, 13 Cal. 640.

91. New matter is that which, under the rules of evidence, the defendant must affirmatively establish. If the onus of proof is thrown upon the defendant, the matter to be proved by him is new matter. *Piercy v. Sabin*, 10 Cal. 22.

92. Where new matter exists, it must be stated in the answer. *Id.*

93. The Code makes no distinction between different classes of new matter. All new matter of defense must be stated in the answer. *Id.*

94. A defense that concedes that plaintiff once had a good cause of action, but insists that it no longer exists, involves new matter. *Id.*

95. Under section forty-six of the Code, there are only two classes of defense allowed. The first consists of a simple denial; and the second, of the allegation of new affirmative matter. And as the Code has abolished all distinctions in the forms of action, and requires only a simple statement of the facts consti-

tuting the cause of action or defense, these two classes of defense must be the same in all cases. *Id.*

96. The general denial only puts in issue the allegations of the complaint. New matter must be specially pleaded, and new matter is that which the defendant must affirmatively establish. *Glaser v. Chitt*, 10 Cal. 303.

97. Where a negative allegation is necessary in stating the cause of action, although it must, of course, precede an averment by the opposite party of the fact negated, it nevertheless constitutes the basis of the issue joined by the subsequent averment, and the latter operates as a traverse and not as an averment of new matter. *Frisch v. Culer*, 21 Cal. 71.

98. To a complaint in the usual form upon a promissory note, an answer was filed admitting the signing of the note, but averring that it was made, not on account of any indebtedness existing between the parties, but for the purpose of being used as collateral security for a debt due to a third person from the maker and payee jointly; that the joint debt was subsequently paid, and that the note having thus become *functus officio*, should have been canceled, but through fraud was taken and held by the payee, and transferred without consideration by him to the plaintiff: *Held*, that these allegations were not new matter, which, under the system of replication then in force, was admitted by a failure to reply; that their only effect was to deny that any obligation of the character counted upon in the complaint was ever created by the signing of the instrument, and thus to traverse its essential allegations. *Goddard v. Fulton*, 21 Cal. 430.

99. Where the allegations of an answer, although stated in an affirmative form, are in effect only a denial of the allegations of the complaint, they do not constitute new matter within the meaning of our Practice Act. *Id.*

100. If the answer, either directly or by way of necessary implication, admits the truth of all the essential allegations of the complaint which show a cause of action, but sets forth facts from which it results that, notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought, those facts are new matter; but if the facts averred in the answer only show that some essential allegation of the complaint is untrue, then they are not new matter, but only a traverse. *Id.*

101. A complaint, in an action to recover personal property, averred that the plaintiff was the owner and possessor of the property at the time of the taking by defendant. The answer denied this allegation, and, in addition, averred affirmatively that the property was at that time owned and possessed by a third person. *Held*, that this averment was but another form of denial, and not new matter which, under system of replication formerly in force, was admitted by a failure to reply. *Woodworth v. Knowlton*, 22 Cal. 164.

102. New matter must be specially pleaded; and whatever admits that a cause of action, as stated in the complaint, once existed, but at the same time avoids it, that is, shows that it has ceased to exist, is new matter. *Coles v. Souleby*, 21 Cal. 47.

103. A levy by a sheriff set forth in the answer as a defense, is new matter. *Mulford v. Estudillo*, 23 Cal. 94.

104. New matter, defendant need not litigate.—In ejectment he is bound to bring forward all matter of a strictly defensive character, or be precluded from again litigating the same; but he is not bound to set up or litigate new matter constituting a cause of action in his favor. *Ayres v. Bensley*, 32 Cal. 620.

105. Plea in abatement.—A failure to join may be pleaded in abatement. *Whitney v. Stark*, 8 Cal. 514.

106. The non-presentation of the claim to the administrator is, in its nature and effect, nothing more than a matter of abatement. It defeats only the plaintiff's present right to recover, and such an objection to the complaint must be made for the first time in the Court below. *Hentsch v. Porter*, 10 Cal. 555.

107. To support a plea in abatement, founded on the pendency of a prior action, it is necessary to show that process was issued in such action. *Primm v. Gray*, 10 Cal. 522.

108. Want of authority in the attorney of record to institute a suit cannot be pleaded in abatement. The proper course, if the suit were not authorized, is for defendant to move the Court upon affidavits to dismiss the suit, upon the ground that it was not authorized by the person in whose name it is brought. If the attorney, on such motion, and after notice of it, fails to show his authority, the Court can dismiss the case. *Turner v. Caruthers*, 17 Cal. 431.

109. Where, on a plea in abatement to the entire action, that another suit, for the same cause of action, was pending at the time of suit brought, the proof shows that the first suit is only for part of the same matter sued for in the second suit, the plea fails. *Thompson v. Lyon*, 14 Cal. 39.

110. Objection should be taken by demurrer or answer to the misjoinder of parties defendant. An answer will not be treated as a plea in abatement for a misjoinder of parties defendant, after the testimony has disclosed a proper cause of action against them. *Warner v. Wilson*, 4 Cal. 310; *Duna v. Toser*, 10 Cal. 170.

111. Matter in abatement, or which was such at common law—as a motion to change the venue—must be set up in the answer, and with such particularity as to exclude every conclusion to the contrary. *Thoms v. Randall*, 3 Cal. 438.

112. Wherever the subject matter of the plea or defense is, that the plaintiff cannot maintain any action at any time, whether present or future, in respect of the supposed cause of action, it may, and usually must, be pleaded in bar; but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should, in general, be pleaded in abatement. *Hensch v. Porter*, 10 Cal. 555.

113. Pleas in abatement are not favored, and the party pleading must prove his plea as put. *Thompson v. Lyon*, 14 Cal. 39.

114. A plea to abate an action by reason of another action pending is not good unless it shows that the pending action was brought for the same cause as the one in which the plea is interposed. *Calaveras Co. v. Brockway*, 30 Cal. 325.

115. A misnomer of parties plaintiff must be objected to by demurrer or answer, and cannot, in the absence of such objection, be made a ground for nonsuiting such of the plaintiffs as show themselves entitled to recover. *Rove v. Baggioluppi*, 21 Cal. 632.

116. If an answer sets up a former suit, pending between the same parties, in abatement of the action, and has annexed to it a copy of the record of the former suit, the annexation of this copy does not do away the necessity of a trial and the introduction of the record in evidence. The question cannot be determined on the pleadings, but there must still be proof of the former suit. *People v. De la Guerra*, 24 Cal. 73.

117. The defense of a prior *lis pendens* is available only where the plaintiff, at least, in both actions is the same. *O'Conner v. Blake*, 29 Cal. 312.

118. Pleas in justification.—Every sale of property and personal chattels is good between the parties, and cannot be attacked, except by a creditor who has recovered judgment and taken out execution against the vendor, which has been returned unsatisfied, in whole or in part—with the single statutory exception of an attaching creditor; and his remedy being unknown to the common law, he must show affirmatively that his attachment has been properly issued, under the statute, before he can attack the sale. *Thornburgh v. Hand*, 7 Cal. 554.

119. For such a purpose the writ of attachment, coupled with proof of the debt, is inadmissible in proof, without introducing the affidavit and other requisites to the issuing of the writ. *Id.*

120. If, in justification by the sheriff under an attachment, judgment and execution, it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff, still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such justification. *Walker v. Woods*, 15 Cal. 66.

121. An officer, in order to justify the seizure of property in the possession of a stranger to the writ which he has executed, must plead specially such justification. He cannot justify under a general denial of the allegations of the

complaint. *Glaser v. Chft*, 10 Cal. 303. See *Coles v. Soulsby*, 21 Cal. 47, where the authorities are collected and commented on.

122. In an action brought against a sheriff for property attached by him, he may plead the property to have been in possession of the defendant in the suit. In such a case, it is not necessary that the defendant should specially plead want of notice and demand in order to make such a defense. *Killey v. Scannell*, 12 Cal. 73.

123. Where a miner enters upon land in the possession of another, claiming the right to enter for mining purposes, he must justify his entry by showing: first, that the land is public land; second, that it contains mines or minerals; third, that he enters for the *bona fide* purpose of mining; and such justification must be affirmatively pleaded in the answer, with all the requisite averments to show a right, under the statute or by law, to enter. *Lents v. Victor*, 17 Cal. 271.

124. In an action of replevin against a sheriff, he must justify not only with the execution, but with the judgment itself, whenever he takes property which is in the possession of a stranger to the writ; or, in other words, whenever the stranger's possession is such as would prevent the debtor himself from retaking the possession. *Knox v. Marshall*, 19 Cal. 617.

125. An answer justifying a trespass on the ground of official duty should aver that the defendant is an officer, and what his official duty is. If there are other defendants, and the answer is intended to apply to them, it should state that they entered in aid of the officer. *Pico v. Colimas*, 32 Cal. 578.

126. Where, in an action against the sheriff for taking goods, he justifies under an attachment against a third person, it is not necessary that his answer should set forth minutely every fact relating to the attachment suit. An answer which stated the time of commencement of the action, the names of parties, the Court, and that the goods were taken by virtue of a writ of attachment issued thereon, held to be sufficient. *Tvedy v. Ellis*, 22 Cal. 650.

127. An answer justifying the seizure of personal property by virtue of a writ of attachment issued against a person other than the plaintiff, does not state facts constituting a defense, if it fails to allege that the defendant in the attachment suit was the owner of the property. *Richardson v. Smith*, 29 Cal. 529.

128. In an action against a sheriff for a violation of his duty in the service of an attachment, if he relies on matters occurring after its issuance and operating as a dissolution of the same, such matter must be specially pleaded. *McComb v. Reed*, 28 Cal. 281.

129. What must be specially pleaded.—Abandonment of land need not be pleaded, where. *Wilson v. Cleaveland*, 30 Cal. 192.

130. Abandonment was affirmatively averred by the defendant in *St. John v. Kidd*, 26 Cal. 266.

131. Abatement. *Tooms v. Randall*, 3 Cal. 448. *Hentsch v. Porter*, 10 Cal. 555.

132. Another action pending was pleaded in the case of *O'Conner v. Blake*, 29 Cal. 314. *Calaveras Co. v. Brockway*, 30 Cal. 325. See post, "plea in abatement;" note, § 46.

133. Accord and satisfaction. *Coles v. Soulsby*, 21 Cal. 47. *Piercy v. Sabin*, 10 Cal. 30.

134. Attachment.—See ante, "pleas in justification."

135. Composition with creditors. *Smith v. Owens*, 21 Cal. 11.

136. Counter-claim should be pleaded. *Hicks v. Green*, 9 Cal. 74.

137. Disclaimers.—14 Cal. 576. Post, § 255. An answer which disclaims all interest in the land in dispute, except such as the defendant may have under the homestead law, by virtue of the dedication of the land to homestead uses by himself and wife, is not a disclaimer. *De Uprey v. De Uprey*, 27 Cal. 331.

138. Equitable titles, defenses and estoppels. See post, "equitable defenses," No. 255. *Clarke v. Huber*, 25 Cal. 591. *Carpentier v. The City of Oakland*, 30 Cal. 439. *Flandreau v. Downey*, 23 Cal. 354. *Blum v. Robertson*, 24 Cal. 146. *Downer v. Smith*, 24 Cal. 124.

139. Estoppels must be specially stated in the answer. *Clarke v. Huber*, 25 Cal. 593.

140. A estoppel by deed or matter of record should be pleaded as such, where there is an opportunity to plead it. Where no opportunity to plead it occurs, it is conclusive as evidence. *Flandreau v. Downey*, 23 Cal. 354.

141. Eviction of the tenant must be set up, when. *Piercy v. Sabin*, 10 Cal. 30.

142. Execution. See *ante*, "Pleas in justification."

143. For fixture of mining claims. *Wiseman v. McNulty*, 25 Cal. 230; *Dutch Flat Co. v. Mooney*, 12 Cal. 534.

144. Former recovery. *Vance v. Olinger*, 27 Cal. 358; *Marshall v. Shafter*, 32 Cal. 176.

145. Fraud, etc. *People v. Supervisors of San Francisco*, 27 Cal. 656; see *post* "Fraud" No. 1.

145. Grant of an easement or servitude. *American Co. v. Bradford*, 27 Cal. 368.

147. Interventions. See § 661.

148. Justification. *Towdy v. Ellis*, 22 Cal. 650; see *ante* "Pleas in justification."

149. Misjoinder of parties plaintiff, owing to matters which have occurred pending the action, must be taken by supplemental answer, or it is waived. *Calderswood v. Pyser*, 31 Cal. 333; *Barstow v. Needman*, Oct. T. 1867.

150. Negligence and want of skill.—Suit by an attorney on a *quantum valebant*, for professional services. Held, that negligence and want of skill need not be set up in the answer. *Bridges v. Paige*, 13 Cal. 640.

151. New matter must be specially pleaded. *Coles v. Soulsby*, 21 Cal. 47, and authorities there cited.

152. New matter occurring after issue joined must be set up by supplemental answer. *Jessup v. King*, 4 Cal. 331; see *post*, No. 172 "Supplemental answer."

153. Payment. *Coles v. Soulsby*, 21 Cal. 47; *Id.* 71. In *Frish v. Caler* (21 Cal. 71) it is held that a plea of payment is not new matter, and in *Fairchild v. Ansbach* (22 Cal. 575) the Court say it follows, that it is not necessary to set it up as a special defense in the answer. [This doctrine is contrary to what was assumed to be the rule by Field, C. J., in *Green v. Palmer*, 15 Cal. 417, and by Burnett, J., in *Piercy v. Sabin*, 10 Cal. 27, and to the current of authorities in New York and elsewhere. Neither payment nor part payment can there be given in evidence under the general issue. Vooch's N. Y. Code, 8 ed., 274; *Id.*, 284 (b.); Vansantword's Pl. 454; see 10 Cal. 30.]

154. Plaintiff, not the real party in interest. See *ante*, § 4.

155. If the complaint in a suit on a note avers that the defendants made and delivered the note to the plaintiff, and that the plaintiff is still the owner and holder, the allegation that the plaintiff is the owner and holder is but a conclusion of law, and an answer denying it, but admitting the other allegations of the complaint, raises no material issue. *Wedderspoon v. Rogers*, 32 Cal. 569.

156. Such answer should be stricken out on motion as irrelevant, and plaintiff is entitled to judgment on the pleadings, even if there is an averment in it, that the action is not prosecuted in the name of the real party in interest, and that another person own the note. *Id.* Vooch's N. Y. Code, (8th ed.) 282 (C.)

157. Release. *Turner v. Caruthers*, 17 Cal. 431; *Coles v. Soulsby*, 21 Cal. 50.

158. Statute of Frauds. *Osborne v. Endicott*, 6 Cal. 149.

159. Statute of Limitations. See *post*, "Statute of Limitations;" see *ante* § 40, note "Statute of Limitations."

160. Subsequently acquired title by defendant in ejectment. *Moss v. Shear*, 30 Cal. 468.

161. Transfer of title by plaintiff. *Id.*

162. Tax titles must be pleaded. *Russell v. Mann*, 22 Cal. 132.

163. Tax titles accruing after action commenced, must be pleaded in a supplemental answer. *McMinn v. O'Connor*, 27 Cal. 246. See *post*, § 46, "supplemental answer."

164. Title in the defendant need not be pleaded, and may be given in under a denial of plaintiff's title. *Marshall v. Shafter*, 32 Cal. 176.

165. Unworkmanlike manner of doing work. *Kendall v. Vallejo*, 1 Cal. 371.

166. Want of capacity in a plaintiff to sue. *California Steam Navigation Co. v. Wright*, 8 Cal. 585.

167. That items in an account stated are overcharged. *Terry v. Sickler*, 13 Cal. 427.

168. Generally.—In an action for damages, for diversion of water of plaintiff, where defendants plead the general issue, it is not competent for the defense to prove that a prior claim to the water exists in a third party. Such a defense should have been specially pleaded, and the third party made a party to the action. *Humphreys v. McCall*, 9 Cal. 59.

169. In an action against a sheriff for refusing to levy an attachment on certain property as belonging to the attachment debtor, testimony that the property had been claimed by a third party, and the right of property tried before a sheriff's jury, and decided in favor of claimant, is irrelevant and inadmissible, when those facts have not been set up as new matter of defense in the answer. *Strong v. Patterson*, 6 Cal. 156.

170. Where the pleadings are verified, every matter of defense, not directly responsive in the allegations of that complaint, must be set up in the answer. *Terry v. Sickles*, 13 Cal. 427.

171. Wherever the subject matter of the plea or defense is, that the plaintiff cannot maintain any action at any time, whether present or future, in respect of the supposed cause of action, it may, and usually must, be pleaded in bar; but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should, in general, be pleaded in abatement. *Heisch v. Porter*, 10 Cal. 555.

172. Supplemental answer.—Evidence of the discharge of the debt sued on, by transactions subsequent to the filing of the answer, is admissible only under the plea of payment *pais darrein continuance*. *Jessup v. King*, 4 Cal. 331.

173. The objection, if it be one, that there is a misjoinder of parties plaintiff, owing to the matters which have occurred pending the action, must be taken by a supplemental answer, or it is waived. *Calderwood v. Pyser*, 31 Cal. 333.

174. If the defendant in an action to recover possession of real estate has acquired title to the demanded premises pending the litigation, evidence of this fact cannot be introduced, unless it is pleaded as a defense in a supplemental answer. *McMinn v. O'Connor*, 27 Cal. 246.

175. In actions to recover lands title acquired by defendants *pendente lite*, and other matters of defense arising subsequent to the commencement of the suit, must be set up by a supplemental answer in the nature of a plea, *pais darrein continuance*. *Moss v. Shear*, 30 Cal. 468.

176. The defendant cannot prove, on the trial of an action of ejectment for the purpose of showing that plaintiff's right of possession has terminated, that since the action was commenced plaintiff has conveyed the land to another person, unless the fact of such conveyance has been set up in the original or a supplemental answer. *Id.*

177. New matter must be specially pleaded; and, in ejectment, a transfer of title by the plaintiff, or a title acquired by defendant, pending the action, must be pleaded by supplemental answer, or it cannot be given in evidence. *Id.* See *ante*, No. 163. See § 67, *post*. Also § 68, No. 89.

178. Cross-complaint. See *post*, § 50.

179. Equitable titles, how pleaded.—The Court, and not the jury, must pass upon the equitable title set up in the answer, and it must be sufficiently pleaded to warrant the Court in granting a decree which will estop the further prosecution of the action. *Downer v. Smith*, 24 Cal. 114; *Arguello v. Edinger*, 10 Cal. 150; *Lestrade v. Barth*, 19 Cal. 660; *Patterson v. Ely*, 19 Cal. 28; *Lestrade v. Murphy*, *Id.* 248; *Meador v. Parsons*, *Id.* 294; *Bhum v. Robertson*, 24 Cal. 124; *Davis v. Davis*, 26 Cal. 38; *Clarke v. Huber*, 25 Cal. 593.

180. Several defenses, when may be united.—See *post*, § 49.

181. Allegations in the complaint, when and where not admitted.—See § 65, *post*.

182. Unless the answer denies the allegations of the complaint, they are admitted without further proof, and constitute conclusive evidence of the extent of the damages claimed. *Patterson v. Ely*, 19 Cal. 28.

183. The failure to deny a material averment is an admission of the facts contained in such averment, and such admission is conclusive against the pleader. *Burke v. Table Mountain Co.*, 12 Cal. 403.

184. Under our practice, and that of the common law, a specific denial of one or more allegations is held to be an admission of all others well pleaded. *De Ro v. Cordas*, 4 Cal. 117.

185. An admission by an attorney of record of the correctness of an amount due, for which judgment is taken, when not done in fraud of the rights of his client, destroys the effect of a denial in an answer. *Taylor v. Randall*, 5 Cal. 73.

186. An answer under our statute is not proof for defendant, but an admission in the answer of a fact stated in the complaint is conclusive evidence against him. *Blankman v. Vallejo*, 15 Cal. 638.

187. Where the admissions in an answer negative its general denials, the latter may be disregarded, and judgment asked upon the former, where the complaint is verified, and the answer consists of such admissions and denials. *Premont v. Seals*, 18 Cal. 433.

188. When the action is upon an account, and defendant in his answer avers, in the form of reasons, for refusing payment when the account was presented to him before suit, that the principal portion was composed of items for printing done for clients, for which he never became personally bound, and that the portion for which he was personally liable "has, to the best of his knowledge and belief," been paid and satisfied, and therefore he pleads payment of the same: *Held*, that this is in substance a denial of indebtedness for a portion of the account, and a plea of payment for the balance; and that it is in effect an admission as to that balance of an original liability, and throws the burden of establishing payment upon the defendant. *Caulfield v. Sanders*, 17 Cal. 569.

189. The failure of a defendant to deny the charges in a complaint, making out a *prima facie* case for the plaintiffs, will throw the *onus* on defendant in proving his affirmative allegations. *Thompson v. Lee*, 8 Cal. 275.

190. The defendant in his answer is required to deny only the material allegations of the complaint. *Racouillat v. Rene*, 32 Cal. 450.

191. Evidence should not be alleged in a complaint. Averments of mere evidence are not admitted by failure to deny them in the answer. *Id.*

192. If the complaint is sworn to, a general denial in the answer admits all its material allegations. *Pico v. Colimas*, 32 Cal. 578.

193. If the complaint in an action to obtain a divorce avers the marriage of the plaintiff and defendant, and the answer does not deny the averment, it is an admission of the fact for the purposes of the trial, and the marriage need not be proved. *Fox v. Fox*, 25 Cal. 587.

194. Proceedings which are void by reason of the infirmity of the statute under which they are had, are not cured by an averment in a complaint that they were duly and legally had; and a failure to deny the averment in the answer is not an admission that the proceedings were valid or legal. *People v. Hastings*, 29 Cal. 449.

195. **Allegations not denied, deemed to be true.**—See post, § 65.

196. **Effect of admissions, or want of denials.**—The intent of the statute is fully carried out by excluding parol testimony to contradict a deed; but where parties admit the real facts of the transaction in their pleadings, these admissions are to be taken as modifications of the instrument. *Lee v. Evans*, 8 Cal. 424.

197. No proof is required of facts admitted or not denied. *Satterson v. Ely*, 19 Cal. 28.

198. **Answer must be consistent.**—Where an amended answer is complete in itself, and is inconsistent with the original answer, the two cannot stand together. *Kuhland v. Sedgwick*, 17 Cal. 123.

199. A sworn answer must be consistent in itself, and must not deny in one sentence what it admits to be true in the next. *Hensley v. Tartar*, 14 Cal. 608.

200. If a fact, which is directly averred in one part of a verified pleading, is in another part directly denied, whether it be in the statement of several causes of action in a complaint or of several defenses in an answer, the party verifying it is guilty of perjury, and on the trial that averment which bears most strongly against the pleader will be taken as true. *Bell v. Brown*, 22 Cal. 671.

201. If no objection be taken to an answer, by a motion to strike out, or by demurrer which sets up inconsistent defenses, defendant may on the trial rely on any one of such defenses. *Klink v. Cohen*, 13 Cal. 623; *Uridias v. Morrell*, 25 Cal. 35. See *post*, § 49.

202. What filing an answer waives.—The answer of the defendant waives the alleged error as to the change of parties, whereby the name of such defendant has been substituted for that of another, without notice. *Smith v. Curtis*, 7 Cal. 584.

203. An answer is a waiver of a demurrer previously interposed. *Pierce v. Minburn*, 1 Cal. 470.

204. An answer to a complaint, after demurrer, overrules the demurrer. *Brooks v. Minburn*, 1 Cal. 481.

205. Where a demurrer to the complaint is put in and overruled, and the defendant then answers, the answer is a waiver of the demurrer. *DeBoom v. Priestly*, 1 Cal. 206.

206. A complaint in an action to set aside a judgment which contains no averment showing that relief could not have been obtained on motion, may be demurrable, but if defendant fails to demur an answer on the merits, and the fact supplying the defect appear in the record, the objection is waived. *Bibend v. Kreutz*, 20 Cal. 109.

207. If a complaint to quiet title avers plaintiff's possession, and the answer admits the averment, this admission is not avoided by a special averment that plaintiff obtained possession by collusion with defendant's tenant. *Reed v. Calderwood*, 32 Cal. 109.

208. Answer to one of two counts.—If the complaint contains two counts, and the answer takes issue on the allegations of one only, plaintiff is entitled to judgment on the other. *Leffingwell v. Greffing*, 31 Cal. 231.

209. Omission to plead a defense specially is not cured by the introduction of evidence without objection in support of it. *Smith v. Owen*, 21 Cal. 11; *McComb v. Reed*, 28 Cal. 289.

210. Where an equitable estoppel *in pais* is not properly pleaded, but on the trial evidence is introduced without objection, in the same manner as if it had been properly pleaded, and a verdict is rendered upon the evidence, without objection, the objection to the pleading will be deemed waived, and the case will be considered as though the estoppel had been properly pleaded. *Davis v. Davis*, 26 Cal. 38.

211. Irrelevant, redundant, superfluous and immaterial matter, does not require an answer, and may be stricken out. See *post*, § 50 and *note*.

212. Answer, evasive, how determined.—In order to determine whether the denials of an answer are evasive, each separate denial of each separate allegation must be taken by itself. If the answer to a particular allegation is a denial of it, and there is no admission in the answer inconsistent with this denial, an issue is fairly made. *Racovillat v. Rene*, 32 Cal. 450.

213. Defense, whether legal or equitable, how determined.—Whether an answer states a purely legal or an equitable defense must be determined by the answer itself, and not from the findings of the Court. *Bodely v. Ferguson*, 30 Cal. 511.

214. Misjoinder of parties.—Objection should be taken by demurrer or answer to the misjoinder of parties defendant. An answer will not be treated as a plea in abatement for a misjoinder of parties defendant, after the testimony has disclosed a proper cause of action against them. *Warner v. Wilson*, 4 Cal. 313.

215. Where two are joined as plaintiff in an action for the recovery of pos-

session of land, a denial in the answer that the plaintiffs were in possession of the land does not present the issue of a misjoinder of either of the plaintiffs. *Gillman v. Sigman*, 29 Cal. 637; see *ante*, § 40, note, sub. 4.

216. **Nonjoinder of parties.**—There are two ways of taking advantage of nonjoinder of parties plaintiff in an action of trover, or apportionment of damages, when the defect does not appear upon the face of the complaint; and these are, at law, either by answer at the trial; and in equity, by answer or demurrer. *Whitney v. Stark*, 8 Cal. 516; see *ante*, § 40, note, sub. 4.

217. **Misjoinder of actions.**—If several causes of action are improperly united in the same action, the objection must be taken either by demurrer or answer, or it will be deemed to have been waived. *Macdonray v. Simmons*, 1 Cal. 395; see *ante*, § 40, note, sub. 5.

218. **Answer not to be evidence.**—An answer responsive to and denying the charges in a bill of equity is not evidence for the defendant, though the bill be sustained by one witness only. *Goodwin v. Hammond*, 13 Cal. 168.

219. The equity rule requiring two witnesses to controvert an answer under oath, does not prevail in this State. The answer is only a pleading, and is not evidence for defendant. *Bostic v. Love*, 16 Cal. 69; *Blankman v. Vallejo*, 15 Cal. 638.

220. An answer under our statute is not proof for defendant, but an admission in the answer of a fact stated in the complaint is conclusive evidence against him. *Blankman v. Vallejo*, 15 Cal. 638.

221. **What may be proven under a general or specific denial.**—That the overflow or leakage was occasioned, not by the acts or negligence of the defendants, but by the acts or negligence of another, was matter of denial simply, not new matter of defense, to be proved only when defendants opened their case. *Jackson v. Feather River Water Co.*, 14 Cal. 18.

222. Where plaintiff avers defendant is indebted to him for cattle sold and delivered, and the answer denies the averment, the defendant may show anything disproving the contract as averred, as that another party, who in fact sold the cattle, sold them as his own, and not as the agent of plaintiff, or that defendant was not to pay until the cattle were fattened and slaughtered. *Hawkins v. Borland*, 14 Cal. 413.

223. Defendant may prove an eviction on a claim for rent in arrear, under the plea *nil debet*, or general denial. *McLaren v. Spaulding*, 2 Cal. 510; overruled in *Piercy v. Tobin*, 10 Cal. 30, and consequently an eviction must be set up in the answer.

224. **Cross demands.**—See *post*, § 48.

225. **Counter claim.**—See *post*, § 47.

226. **Conditions precedent, how pleaded.**—See *post*, § 60.

227. **Material allegation.**—See *post*, § 66.

228. **Written instrument, when deemed admitted.**—See *post*, § 54.

229. **Answer, how construed.**—See *post*, § 70.

230. **Defects, to be disregarded.**—See *post*, § 71.

231. **Time to answer may be enlarged.**—See *post*, § 68.

ANSWER IN SPECIAL CASES.

232. **Bankruptcy.**—The answer to a suit on a note set up defendant's discharge in insolvency. Plaintiff demurred to the answer on the ground that it did not allege that the note was described, set forth or included in defendant's schedule. *Held*, that the demurrer was not well taken; that under section fifty-nine of the Practice Act, it was sufficient to allege in the answer that a judgment had been duly rendered discharging defendant from the demand sued on; and that whether the demand were sufficiently described was matter of evidence, to be determined at the trial by inspection of the record. *Hansom v. Tower*, 17 Cal. 518.

233. **Bills of exchange and promissory notes.**—The failure to make presentment at the place named would not discharge the debt, but could only be pleaded in defense as to the question of costs and damages. *Montgomery v. Tut*, 11 Cal. 307.

234. A copy of the note sued on being attached to, and made a part of, the complaint, the answer, not verified, admits the genuineness and due execution of the note, and entitles the plaintiff to judgment. *Horn v. Volcano Water Company*, 13 Cal. 62.

235. An answer to a suit on a promissory note by the assignee, which sets up as one defense: first, that the note was made payable to order, and was afterwards fraudulently altered by inserting the word "bearer" in lieu of the word "order;" second, that the defendant paid the note before assignment; third, note was assigned to plaintiff after maturity, etc. *Held*, not fatally defective. *Sherman v. Rollberg*, 11 Cal. 38.

236. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest. *Krizer v. Mills*, 9 Cal. 21.

237. In a suit on a note, the complaint containing the note or a copy, a denial of indebtedness is no denial at all. *Kinney v. Osborne*, 14 Cal. 112.

238. Where, in an action on a lost note, a verified complaint alleges that on a particular day the note in question was made by defendant, and delivered to plaintiff, an answer denying the making and delivery of the note on the day mentioned is insufficient. Such denial does not reach the substantial matter of the averment, and only raises an immaterial issue as to time. *Castro v. Wetmore*, 16 Cal. 379.

239. Where, in an action on a lost note, the complaint, verified, alleges the loss, stating particularly the circumstances thereof, an answer denying that the note was lost as alleged does not put in issue the fact of loss, which is the gist of the averment, but only the circumstances of the loss, which are collateral and immaterial. *Id.*

240. Suit on a promissory note made by defendants. The complaint, not verified, set out the note, and avers assignment thereof by payee to plaintiff. Answer, general denial. *Held*, that the answer does not admit, but denies the assignment, and hence, the plaintiff must prove it, and is not entitled to judgment on the pleadings. *Hastings v. Dollarhide*, 18 Cal. 390.

241. In defense to an action on a promissory note, it is not sufficient to plead, in general terms, want of consideration, and that the note was obtained by fraud; the answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud. *Gushee v. Leavitt*, 5 Cal. 160.

242. It is not a good plea to allege that a note sued on is the property of another, and not of the plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, and which could not be set up against the plaintiff. *Id.*

243. In an action on a promissory note by a special indorsee against the maker, the plaintiff must prove at the trial the genuineness of the indorsements, although the defendant has not denied their genuineness under oath. *Grogan v. Ruckle*, 1 Cal. 158—reconsidered and affirmed in *Id.* 193.

244. If the complaint in an action by the assignee of a promissory note against the maker avers that the note was assigned to the plaintiff for a valuable consideration before maturity, and is sworn to, an answer which denies that the note was for a valuable consideration indorsed and delivered by the payee to the plaintiff before maturity, or at any other time, does not put in issue the fact of the assignment before maturity, but if it puts in issue anything, it is only the allegation that the assignment was made for a valuable consideration. *Morrill v. Morrill*, 26 Cal. 288.

245. If the complaint in a suit on a note avers that the defendant made and delivered the note to the plaintiff, and that the plaintiff is still the owner and holder, the allegation that plaintiff is the owner and holder is but a conclusion

of law, and an answer denying it, but admitting the other allegations of the complaint, raises no material issue. *Wedderspoon v. Rogers*, 32 Cal. 569.

246. Where, to an action upon a promissory note, an agreement of composition between the debtor and his creditors, including the plaintiff, is relied upon as a defense, such agreement must be specially pleaded, and cannot be considered under a plea of accord and satisfaction by the giving of new notes. *Smith v. Owens*, 21 Cal. 11.

247. If a defendant would resist the payment of a promissory note, given for mining stock, on the ground that the seller made fraudulent representations as to the value of the mine, the answer should set up the defense, and aver either that the stock was valueless to either party, or that the defendant had offered to return it and rescind the contract. *Gifford v. Carvill*, 29 Cal. 589.

248. **Corporations.**—The rule which requires a defendant to answer positively as to the facts alleged in a verified complaint, which are presumptively within his own knowledge, applies to municipal corporations. The statute makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons. *San Francisco Gas Co. v. The City*, 9 Cal. 453.

249. There may exist the best reasons for a different rule of pleading when a municipal corporation is a defendant; but this Court can make no distinction, because the Code makes none. It is a matter for the Legislature, and not for the Court. *Id.*

250. In an action against a corporation to recover dividends which have accrued on its stock, if the plaintiff avers, "that, from a date named, she was, has been, and still is, the owner in her own right, and as her separate property, of the stock," the answer raises an issue if it denies that, at the date named, "the plaintiff was, has since been, or still is, the owner in her own right and as her separate property" of the stock. The qualification of the denial by the words "in her own right and as her separate property" are mere surplusage. *Dow v. Gould & Curry Silver Mining Co.*, 31 Cal. 630.

251. **Divorce.**—The doctrine of recrimination, or *compensatio criminum*, applicable in suits for divorce, and the several offenses which, by the statute, constitute grounds of divorce, are pleadable in bar to such suits, the one to the other, within the principle of the doctrine. *Conant v. Conant*, 10 Cal. 249.

252. To be an absolute bar, the conduct of the plaintiff must be such as to constitute a proper basis for judicial decree against her, had suit been instituted by the defendant. *Id.*

253. In an application by the wife for a divorce, on the ground of the willful neglect of her husband, and his failure to provide her with the necessities of life, for the period of three years, the residence of the husband with the wife within the three years is no answer to the application, where it appears that they were not living together at the commencement of the suit. *Washburn v. Washburn*, 9 Cal. 475.

254. If the complaint in an action to obtain a divorce avers the marriage of plaintiff and defendant, and the answer does not deny the averment, it is an admission of the fact for the purposes of the trial, and the marriage need not be proved. *Fox v. Fox*, 25 Cal. 587; *Bennett v. Bennett*, 28 Cal. 599.

255. **Ejectment, equitable defenses.**—The defense arising from a verbal contract for the sale of land, accompanied with acts of part performance, taking the contract from the operation of the statute, is permissible, under our system of practice, to an action of ejectment for the recovery of the premises. The only effect of this mode of asserting the rights of the defendants, instead of filing a bill in equity, is to require the Court to pass upon the questions raised by the answer in the first instance. If, upon hearing the evidence, the Court should determine there was ground for relief, it would enjoin the further prosecution of the action with its decree for a specific performance; and, on the other hand, if it should refuse the relief, it would call a jury to determine the issue upon the general denial. *Arquello v. Edinger*, 10 Cal. 150.

256. Under our system of practice, equitable defenses may be interposed

to the action of ejectment, but the defendant in such cases becomes an actor with respect to the matter presented by him, and his answer must contain all the essential averments of a bill in equity, and the equity presented must be of such a character that it may be ripened by the decree of the Court into a legal right to the premises, or such as will stop the plaintiff in the prosecution of the action. *Lestrade v. Barth*, 19 Cal. 660.

257. Unless the answer denies the allegations of the complaint, they are admitted without further proof, damages included. *Patterson v. Ely*, 19 Cal. 28.

258. When an equitable answer is interposed to an action of ejectment, said answer being a bill in equity, can only be interposed where the parties to the action are such as would be required to a bill in equity seeking the same relief. *Lestrade v. Barth*, 19 Cal. 660.

259. An answer in ejectment setting up an equitable defense is in the nature of a bill in equity, and must contain its essential averments. The defendant then becomes an actor with respect to the matter alleged by him, and his defense must be of such a character as may be ripened by the decree of the Court into a legal right to the premises, or as will estop the plaintiff from the prosecution of the action of the plaintiff. *Estrade v. Murphy*, 19 Cal. 248; *Meador v. Parsons*, 19 Cal. 294.

260. If the defendant, in an action of ejectment, relies on an equitable title to the demanded premises as a defense, it must be pleaded, and the answer setting it up must, in substance at least, possess all the elements and essential qualities of a bill in equity, and the equity presented must be of such a character that it may be ripened by the decree of the Court into a legal title to the premises, or such as will estop the plaintiff from the prosecution of the action. *Bham v. Robertson*, 24 Cal. 146; *Downer v. Smith*, Id., 124.

261. And he must inform the adverse party of the nature of the cause of action or defense which he will be obliged to meet, and to do this he must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits of equity. *Davis v. Davis*, 26 Cal. 38.

262. Although a party may set up an equitable defense to an action at law, he is not confined to that proceeding. He may let the judgment go at law, and file his bill in equity for relief. *Lorraine v. Long*, 6 Cal. 452.

263. Ejectment, separate answer.—Where there are several defendants, to entitle them to separate verdicts they should set forth with specific description the parcels which they severally occupy or claim. *Patterson v. Ely*, 19 Cal. 28; *McFarney v. Little*, 16 Id. 81.

264. If the defendant in ejectment desires to defend for only a portion of the premises, and to limit his liability for mesne profits in a corresponding proportion he must frame his answer accordingly, and specify the portion of the premises for which it is intended to defend and disclaim as to the balance. *Guy v. Hanly*, 21 Cal. 397.

265. Ejectment, abandonment need not be pleaded, when.—In an action of ejectment, one of the material allegations of the complaint is, that the plaintiff was the owner and entitled to the possession at the time of the alleged entry by defendant, and under a direct denial of this averment the defendant may show that, previous to his entry, a title which once existed in the plaintiff had been lost by abandonment or forfeiture. *Bell v. Brown*, 22 Cal. 671.

266. Where the strict legal title is not involved, and the plaintiff relies upon a right to recover, founded upon naked possession, the defendant, under the general issue, without pleading abandonment, may prove an abandonment of the premises by the plaintiff before the defendant's entry. *Wilson v. Cleveland*, 30 Cal. 192.

267. Ejectment, generally.—If, in ejectment, the entry and ouster are denied in the answer, the withholding of possession at the commencement of the action is not admitted by the pleading, although it is not specially denied. *Huckins v. Reichert*, 28 Cal. 534.

268. The husband or the wife may set up the fact of homestead as a defense to ejectment, based upon a sheriff's deed of the premises, made in pursuance of

an execution sale on a judgment at law against the husband—there having been no abandonment of the homestead. *Williams v. Young*, 17 Cal. 403.

269. The complaint charged that on a day mentioned the plaintiffs were lawfully seized and possessed, and had the right of possession of a certain tract of land, and that defendants afterwards entered into and upon the said tract, and ousted plaintiffs therefrom. The answer in response to these allegations averred that the defendant was not guilty of the supposed trespasses and ejectment in the complaint mentioned, nor of any part thereof. *Held*, that the answer raised no issue. *Schenk et al. v. Evey et al.*, 24 Cal. 113.

270. The complaint in ejectment was filed on the 27th of January, and averred that the defendants were in possession of the demanded premises. The answer was filed on the 8th day of February, and the only response to this averment was as follows: "This defendant further says, that he is not in possession of the lands and tenements described in the complaint, or any part thereof." *Held*, that the allegation of the complaint must be taken as confessed. *Id.*

271. Where, in an action of ejectment, the complaint did not directly aver a seizin or ownership of the premises by plaintiff, but alleged that the plaintiff, by location, survey and certain other acts, acquired possession; and the answer denied these acts, except the survey, and denied that plaintiff acquired possession by location "or in any other manner." *Held*, that the allegation of prior possession was sufficiently denied by the answer. *La Rue v. Oppenheimer*, 20 Cal. 517.

272. An allegation in an answer of the defendant in ejectment, of title in himself, does not constitute new matter, and is only equivalent to a general denial of title in the plaintiff. *Marshall v. Shafter*, 32 Cal. 176.

273. An answer in an action of ejectment, where both parties claim under a common grantor, which sets up as a defense a legal title in defendant; and also a verbal contract made by plaintiff's grantor to convey, and an entry under, and a subsequent purchase by plaintiff, with notice, contains both a legal and equitable defense. *Bodley v. Ferguson*, 30 Cal. 511.

274. Where a complaint for the possession of land avers defendants to be in possession, and the answer does not deny, but affirmatively shows it, then, even if the allegation of possession be not material, and therefore not requiring a denial, the fact of possession becomes a matter of admission or agreement between the parties, as an independent fact, not in issue by the pleadings, but affecting the whole case. *Powell v. Oullahan*, 14 Cal. 114.

275. The averments of possession and ouster, in this case, were held to be insufficiently denied. See statement of facts. *Smith v. Doe*, 15 Cal. 100.

276. A defendant in ejectment, entering under a deed executed by order of a Court of competent jurisdiction, enters under color of title. He is not a naked trespasser, and may set out an outstanding title in a third person. *Gregory v. Haynes*, 13 Cal. 591.

277. In an action of ejectment, where the complaint alleges possession in the defendant, a denial in the answer in the following words is not sufficient to put at issue the question of possession: "Defendant denies that he has unlawfully, wrongfully, and in violation of the plaintiff's rights, had possession," etc. This denial might be true, and yet the defendant be in possession. The defendant was called on to answer, not only the character of the possession, but the fact of possession. *Burke v. Table Mountain Co.*, 12 Cal. 403.

278. Where plaintiff had possession under a deed, duly recorded, and the defendant having entered with notice of and in subordination to plaintiff's title, cannot be permitted to deny it in an action of ejectment. *Stephens v. Mansfield*, 11 Cal. 363.

279. In an action of ejectment to recover the possession of land, where the defendant simply denied the allegation of the complaint: *Held*, that he could not introduce in evidence a copy of the record of a former recovery. *Piercy v. Sabin*, 10 Cal. 22.

280. When a complaint alleges that the plaintiff was in the quiet and peaceable possession of premises, and was dispossessed by defendants by force, or under an illegal order made by an officer having no jurisdiction, the answer should take issue directly upon the allegations of the complaint, or confessing

them, should state distinctly and positively new matter sufficient to avoid them. *Ladd v. Stevenson*, 1 Cal. 18.

291. An allegation, in a verified complaint, that "defendants wrongfully and unlawfully entered upon and dispossessed" plaintiff, is not sufficiently denied by a denial that "defendants wrongfully and unlawfully entered and dispossessed" plaintiff, because such denial admits entry and ouster. *Busch v. Coffey*, 14 Cal. 91.

292. The defendant in ejectment may deny the title of the plaintiff, and also plead the Statute of Limitations. *Wilson v. Cleveland*, 30 Cal. 192.

293. A defendant in ejectment who desires to set off the value of his improvements against the means profits, must assert his right by proper averments in his answer, or he is precluded from doing so at the trial. *Moss v. Moor*, 25 Cal. 44.

294. Foreclosure.—Where a party made defendant in a foreclosure suit, as claiming some interest in the land, sets up, as a full defense, a tax title, he cannot object afterward that equity has no jurisdiction over tax titles. *Kelsey v. Abbott*, 13 Cal. 609.

295. In a foreclosure suit on a note and mortgage of the homestead executed by husband and wife, the wife alone answered, but did not verify her answer. On suit brought to vacate the decree rendered in the foreclosure suit, the wife having been served with process, cannot complain that her answer was not verified. And her failure, by excusable negligence, to make defense to the foreclosure, is no ground to vacate the decree, if it be shown that in fact she had no defense. *Pfeiffer v. Rehn*, 13 Cal. 643.

296. Where the answer, while averring that the deed was a conditional deed, admits that the money was received by defendant on the understanding that if the money was repaid in six months, with interest, plaintiff was to re-convey, and does specifically deny that the money was loaned: *Held*, that it virtually admitted the loan. *Lee v. Evans*, 8 Cal. 424.

297. The allegation in the answer, that unless the money was returned, the property should remain in the plaintiff, does not change the nature of the contract. This is the usual form of a mortgage. *Id.*

298. Although an answer denies the delivery of a bond and mortgage, still their possession by plaintiff is evidence of delivery. *Blankman v. Vallejo*, 15 Cal. 638.

299. Forfeiture, plea of.—In an action of ejectment to recover mining claims, an answer to the complaint which avers that any right that plaintiffs may have ever had to the possession, etc., they forfeited by a non-compliance with the rules, customs and regulations of the miners of the diggings embracing the claims in dispute, prior to the defendants' entry, is insufficient, in not setting forth the rules, customs, etc. *Dutch Flat Co. v. Mooney*, 13 Cal. 584.

300. The facts should be stated so as to enable the Court to determine whether the forfeiture did accrue. The averment of forfeiture is a legal conclusion, upon which no issue can be taken. *Id.*

301. Fraud.—A case where it was held the answer sufficiently presented the question of fraud. *Lamott v. Butler*, 18 Cal. 32.

302. The circumstances constituting fraud must be set up. *Gushee v. Leavitt*, 5 Cal. 160.

303. Suit on note for the purchase of land. Answer set up that the note was given for the land, fencing and building materials; that plaintiff falsely represented that there was building material for building a barn; that this material was so insufficient in quantity that it cost six hundred dollars to buy more, etc. There were some averments as to the rotten condition of fences, which plaintiff represented to be good: *Held*, that defendant having taken possession under the contract, and retaining it, cannot set up representations, fraudulent or otherwise, as to fences, they being, in this case, part of the freehold. *Held*, further, that a special demurrer being put into the answer, it sets up no defense as to the building material, because neither quantity nor value is given. Plaintiff is responsible, not for what defendant paid for material.

ber, but for the value of lumber contracted for, and not delivered, and this at the time of contracting. *Kinney v. Osborne*, 14 Cal. 112.

294. The answer is also fatally defective, in not charging the representations to have been fraudulently made, or that there was a warranty of some particular quantity of lumber. *Id.*

295. The mere fact that a vendor of land was aware of the existence of a judgment, which was an incumbrance on the land at the time of his sale, and failed to inform the vendee of the existence of such judgment, is not a fraud so as to constitute a defense to suit on a note for the purchase money, where the means of information—to wit, the county records—were equally accessible to both parties. In such case, if the vendee neglected to inform himself, he is guilty of negligence, and cannot set up his ignorance as a ground of fraud, unless by deceit or misrepresentation he has been misled. *Ward v. Packard*, 18 Cal. 391.

296. An answer seeking to avoid a contract, by reason of fraudulent misrepresentations of the plaintiff in procuring it, must state in what the misrepresentations consisted, and they must be of matter of fact of which defendant was ignorant, and not of law. *People v. Supervisors of San Francisco*, 27 Cal. 656.

297. Where an answer contains a general allegation of fraud, and plaintiff go to trial upon the issue thus joined, without taking any exception to the answer on the ground of sufficiency, and there is no objection made by the plaintiffs to the testimony introduced by defendants, in support of the issue of fraud, an objection to the answer, on the ground that it does not contain a statement of the particular facts and circumstances constituting the alleged fraud, cannot be entertained by the Supreme Court on appeal. *King v. Davis*, Oct. T., 1867.

298. Judgments, how pleaded.—See post, § 59.

299. Label, how answered.—See post, § 63.

300. Quietting title.—If the answer in an action to quiet title admits plaintiff's ownership in fee simple and possession, the rightfulness of the possession follows the admission, and even if plaintiff went into possession by leave of defendant's tenant, he is not estopped from denying defendant's title. *Reed v. Calderwood*, 32 Cal. 109. See § 254.

301. Rent.—Where the answer of the defendant, on a claim for rent in arrear, "denies that he is indebted to said plaintiff in manner and form as said plaintiff has above thereof complained against him," it is substantially the plea of *nil debet* at common law, and under it the defendant may prove an eviction. *McLaren v. Spalding*, 2 Cal. 510. (See next note.)

302. *Piercy v. Sabn* (10 Cal. 22), and *Haser v. Chff* (id. 303), as to the necessity of pleading new matter in defense, affirmed and held to have overruled the doctrine of *Gavin v. Anaan* (2 Cal. 494), and *McLarren v. Spalding*, (id. 510); *Coles v. Souleby*, 21 Cal. 47.

303. Replevin.—Where the complaint in replevin averred that on a certain day plaintiff was the owner and in possession of the property, and that its value was \$1,000; and the answer denied that on the day specified the "plaintiff was the owner and lawfully in possession," and as to its value, averred that the defendant has no knowledge, etc., and therefore denies that it is worth \$1,000: Held, that the answer is insufficient, because it raises an immaterial issue as to time; and as to the possession of the property, that it amounts merely to a conclusion of law. *Kuhland v. Sedgwick*, 17 Cal. 123.

304. Slander.—See post, § 63.

305. Statute of Frauds.

306. A plaintiff's recovery cannot be barred by the Statute of Frauds, unless the statute be pleaded. *Osborne v. Endicott*, 8 Cal. 149.

307. Statute of Limitations, how pleaded.—To suit on an account, defendant averred that "each and every item of said account, prior to the tenth day of March, 1869, is barred by time; and he pleads and relies upon the

statute of the State of California, entitled 'An Act defining the time of commencing Civil Actions,' approved April 22d, 1850, in bar of an averment of a conclusion of law." *Held*, that a plea of the Statute of Limitations must aver the facts which bring the demand within the operation of the statute—as that the alleged cause of action has not accrued within certain designated years previous to filing the complaint. *Caulfield v. Sanders*, 17 Cal. 569.

308. A defendant relying on the Statute of Limitations should not allege matter of law, but the facts which bring him within the statute. *Boyd v. Blankman*, 29 Cal. 20.

309. An answer stating that the cause of action has not accrued within five years, is sufficient for five years; and for any period of limitation named in the statute less than five years. *Id.*

310. In pleading the Statute of Limitations it was alleged "that the plaintiff is not entitled to have or maintain this action, because the plaintiff was not seized or possessed of the real estate described in said complaint within five years next before the commencement of this action." *Held*, that the statement was fatally defective. There was no averment that the plaintiff's predecessor or grantor was not possessed within five years; nor was an adverse possession alleged for any period of time anterior to the action. *Sharp v. Dagny*, Oct. T. 1867.

311. The defense of the Statute of Limitations is a personal privilege of the debtor, which he may assert or waive at his option; but it must be set up in some form, either by demurrer or answer, or it will be deemed to have been waived. *Grattan v. Wiggins*, 23 Cal. 16, § 46.

312. Defendant set up as a defense "that the title of the said plaintiff, if any he has to said premises, did not accrue within five years prior to the commencement of this suit, and that he has not been in possession thereof within five years prior to this suit." *Held*, not to be a plea of the Statute of Limitations. *McKay v. Petakuma Lodge, Reyburn et als.*, April T., 1866.

313. An answer which avers that "if plaintiffs ever had any right or title to their claims, or to any portion thereof, they are barred by the Statute of Limitations, as they, the defendants, have been in quiet and peaceable possession of the same, adversely to these plaintiffs, for a period over five years," is not a good plea to the Statute of Limitations. *Table Mountain Tunnel Co. v. Stranahan*, 31 Cal. 367.

314. The general allegation in answer, that the action is barred by the statute prescribing two or any other number of years as the limitation for bringing the action, is not the correct method of pleading the Statute of Limitations. *Schroeder v. Johns*, 27 Cal. 278.

315. If the complaint in an action against an administrator avers that the intestate received plaintiff's money in his life time, to keep the same for plaintiff as the depository thereof until the same should be demanded of him, and that the money remained in the intestate's hands at the time of his death, subject to the plaintiff's order, an answer which sets up as a defense that the cause of action did not accrue to plaintiff within two years next before the death of the intestate, and that the same is barred by the Statute of Limitations, does not raise an issue in the case. *Id.*

316. Where a party desires to avail himself of the statute, which provides that no action for the recovery of any estate sold by an executor or administrator, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale, he must plead it. The objection that the action is barred cannot be taken to the admissibility of evidence, when the statute has not been pleaded. *Mosks v. Hahn*, 20 Cal. 620.

317. A party relying upon an adverse possession of five years of land owned by himself and the adverse party as tenants in common, must allege by pleading facts from which it will affirmatively appear that his possession was of an adverse and hostile character, otherwise his possession of the land, though exclusive, will be deemed according to his right and in support of the title in common. *Liek v. Diaz*, 30 Cal. 65.

318. The party claiming a right to the use of water by five years' adverse possession must set up the same as a defense in his answer, and if he does

not, he loses the right to introduce evidence in support of it, and to have the Court instruct the jury in relation to it. *American Co. v. Bradford*, 27 Cal. 366.

319. The Statute of Limitations runs only in favor of parties in possession claiming title adversely to the whole world, and not in favor of those who assert the title to be in others. It, therefore, never runs in favor of the plaintiff, and the grantees of the plaintiff are in no better position. Their possession cannot be tacked on to that of the grantor, so as to render adverse the possession for the entire period subsequent to the sale. *Field, C. J. McCracken v. City of San Francisco*, 16 Cal. 591.

320. To render possession adverse, so as to set the Statute of Limitation in motion, it must be accompanied with a claim of title, and this claim, when founded "upon a written instrument as being a conveyance of the premises," must be asserted by the occupant in good faith, in the belief that he has good right to the premises, and with the intention to hold them against all the world. The claim must be absolute—not dependent upon any contingencies—and must be "exclusive of any other right;" and, to render the adverse possession thus commenced effectual as a bar to a recovery by the true owner, the possession must be continued without interruption, under such claim, for five years. When parties assert, either by declaration or conduct, the title to property to be in others, the statute cannot, of course, run in their favor. Their possession, under such circumstances, is not adverse. *Id.*

321. An equitable action, to set aside a fraudulent deed of real estate, when the effect would be to restore the possession to the defrauded party, is an action for the recovery of real estate, and governed by the Statute of Limitations applicable to such actions. *City of Oakland v. Carpentier*, 13 Cal. 540.

322. Where, to ejectment on a patent to plaintiffs for land from the United States, defendants plead possession in themselves, and the parties through whom they claim, for five years before the commencement of the action, on the fourth of March, 1860, but admitted the issuance of the patent on the nineteenth of February, 1865: *Held*, that the plea is of no avail, because the admission shows plaintiffs were seized of the premises within the five years. *Fremont v. Seale*, 18 Cal. 433.

323. If the demand be in truth barred, but the fact does not appear upon the face of the complaint, the defense must be made in the answer. *Smith v. Richmond*, 19 Cal. 476.

324. Statutes of Limitation do not act retrospectively; they do not begin to run until they are passed, and consequently cannot be pleaded until the period fixed by them has fully run since their passage. *Nelson v. Nelson*, 6 Cal. 430.

325. When the plea of the statute is claimed as a mere legal right, it must be pleaded in the first instance, and has no day of grace thereafter. *Cooke v. Spears*, 2 Cal. 409.

326. In this State, the Statute of Limitations applies equally to actions at law and to suits in equity. It is directed to the subject matter and not to the form of the action, or to the forum in which the action is prosecuted. Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties. *Lord v. Morris*, 18 Cal. 492; *Boyd v. Blankman*, 29 Cal. 20.

327. Statute of Limitations.—See demurrer, § 40.

328. Private statutes, how pleaded.—See post, § 61.

329. Tax title.—Whenever a tax title is specially set forth in a pleading, it is necessary that every fact should be averred which is requisite to show that each of the statutory provisions have been complied with. This necessity is not obviated by the provisions making the tax deed proof of certain facts. *Russell v. Mann*, 22 Cal. 131.

330. In pleading a tax title, it is necessary to aver those facts which sections 18 and 22 of the revenue act of 1857 are required to be stated in the tax deed. *Id.*

331. A pleading, settling up a tax title, must aver distinctly, for what year the tax was assessed, and failing to do so, is demurrable. *Id.*

332. **Tender, plea of**, where there are two kinds of money. If, by the laws of the United States, there is more than one kind of lawful money, a legal tender in payment of debts, and the plaintiff in an action is entitled to a judgment payable in a particular kind of money, a plea of tender which avers the tender to have been made in lawful money of the United States, is insufficient. The plea should aver that the tender was made in the kind of money the plaintiff is entitled to receive. *Magraw v. McGlynn*, 26 Cal. 428.

333. **Trespass**.—In an action of trespass, where there is no specific denial of the amount of damages alleged in the complaint, although the alleged cause of damage is specially traversed, it is doubtful whether such answer amounts to a denial of the damage. *Rove v. Bradley*, 12 Cal. 226.

334. In an action for a trespass upon land, alleged by the complaint to be in the possession of the plaintiff at the time of the unlawful entry thereon by the defendants, it is not a sufficient traverse of the allegation of possession for the defendants to aver, in their answer, that to the best of their information and belief they did not commit the grievance upon any land in the lawful possession of plaintiff. *McCormick v. Bailly*, 10 Cal. 230.

335. In trespass *quare clausum fregit*, where the complaint avers matters of aggravation after the entry, an answer justifying the aggravating matter, but admitting plaintiff's title and possession, does not state facts sufficient to constitute a defense. *Pico v. Colinas*, 32 Cal. 578.

336. In trespass *quare clausum fregit*, an answer justifying merely because the defendant has an easement on the land, contains no defense. *Id.*

337. **Undertakings and sealed instruments**.—Conceding that there is a necessary discrepancy between the condition and the penal portion of the bond, it cannot be set up by the obligors, as the bond would be single, and, in a suit thereon, the plaintiff would be entitled to the full amount. *Swain v. Graves*, 8 Cal. 549.

338. The law imports a consideration to a sealed instrument from its seal. At common law, a want of consideration could not be pleaded to a suit on a sealed instrument, the presumption of a consideration being absolute and conclusive. The statute of this State has not altered the presumption of a consideration which still accompanies the instrument, but only modified the rule so far as to allow it to be rebutted in the answer. *McCarthy v. Beach*, 10 Cal. 461; *Wills v. Kempt*, 17 Cal. 96.

339. Where an answer contains an allegation of alteration in an instrument, it must state that such alteration was made with the knowledge or consent, or by the authority of the plaintiff. *Humphreys v. Crane*, 5 Cal. 173.

340. In an action on an undertaking executed by and on behalf of the defendants in a judgment in ejectment, conditioned to pay the value of the use and occupation of the premises pending the appeal, an answer setting up that pending the appeal the plaintiff conveyed a part of the premises to one or more of the defendants in the judgment, and had leased portions to other parties does not state facts sufficient to constitute a defense. *De Castro v. Clarke*, 29 Cal. 11.

341. Such answer failing to show when the conveyance was made, it will be deemed not to have been made until the last day the appeal was pending. *Id.*

342. Such answer is also defective in not stating that the use and occupation of the portions of the premises conveyed and leased was of any value. *Id.*

§ 47. *Counter claim.*

The counter claim mentioned in the last section shall be one existing in favor of the defendant or plaintiff, and against a plaintiff or defendant, between whom a several judgment might be had in the action, and arising out of one of the following causes of action :

1st. A cause of action arising out of the transaction set forth in the complaint or answer, as the foundation of the plaintiff's claim, or defendant's defense, or connected with the subject of the action.

2d. In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action.

¹ Amended Stat. 1860, 299; N. Y. Code, § 150; see *ante*, § 5, Abb. Forms, No. 1090, 1091.

1. **Set-off at law.**—To authorize a set-off at law, the debts must be between the parties in their own rights, and must be of the same kind and quality, and be clearly ascertained or liquidated; they must be certain and determined debts. *Naglee v. Palmer*, 7 Cal. 543. [Commented on in *Duff v. Hobbs*, 19 Cal. 646, and not approved.]

2. **Assignment before notice.**—When a creditor, having a debt due him by mortgage, assigns the debt and mortgage, a judgment in favor of a third person against the creditor purchased by the debtor after the assignment, but before notice to him, constitutes an off-set *pro tanto* to the debt in an action upon it by the assignee. *McCabe v. Grey*, 20 Cal. 509; see *ante*, § 5.

3. **Breach of warranty, defense by way of recoupment.**—In an action for the price of goods sold and delivered, there being a warranty as to the quality of the goods, the breach of the warranty may be relied on in defense by way of recoupment to mitigate the amount recovered; but it is not available as a complete defense to the action. *Earl v. Bull*, 15 Cal. 425.

4. **Counter claims, recoupment and set-offs in actions on contract.** Plaintiff sues for balance due on a contract for erecting a building, and a small sum for extra work. Defendant seeks to offset a claim for two and one-third months' rent lost by him, because of the neglect of plaintiff to finish the building within the time specified in the contract, defendant having at the date of the contract leased the building to responsible tenants, the lease to take effect from the time named in the contract for its completion. *Held*, that defendant cannot offset his rents, because the circumstances show that the contract was modified by the parties as to the time for the completion of the building. *McGinley v. Hardy*, 18 Cal. 115.

5. If a merchant employs one by written contract, at a stated salary, to act as his chief clerk and managing agent for a stated time, and an action is brought by the clerk on the contract for wages, and the answer sets up a counter claim for damages arising out of neglect of the clerk to attend to the business, the defendant has a right on the trial to introduce evidence of a loss of his profits and discontinuation of business caused by the clerk's neglect; and to do this, he may ask a witness what amount of additional business would have been done if the clerk had attended to his business. *Stoddard v. Treadwell*, 26 Cal. 300.

6. When the plaintiff's action arises out of contract, defendant may introduce evidence of any counter-claim arising out of contract existing at the commencement of the action, even though the contracts are not the same. *Id.*

7. When the claim of plaintiff and counter-claim of defendant both arise out of the same contract, defendant may introduce evidence of unliquidated damages embraced in his counter-claim, unless the plaintiff come to the contract by assignment. *Id.*

8. When an action is based upon a contract to pay a stipulated sum, and the answer sets up a counter-claim for damages for matters arising out of the same contract, the defendant cannot, on the trial, introduce evidence of any damages except those specially set up in the answer. *Id.*

9. If the complaint is based on a written contract, by the terms of which

plaintiff is to do certain things, and the complaint avers a faithful performance on his part, and the answer denies the performance, the defendant cannot, under this allegation and denial, introduce evidence of a counter-claim. *Id.*

10. Where one is employed by another under a contract, at a stated salary, payable monthly or at a stated time, to act as his clerk or transact business for him, and the employee neglects the business, the employer is not precluded from maintaining an action for damages for this neglect, by payment in full of the employer's wages, or by allowing the employee to sue and recover judgment, by refraining from interposing any counter-claim for a breach of the employee's contract. *Id.*

11. M. E. T. being indebted to V. in the sum of six hundred and seventy-one dollars, plaintiff, for the accommodation of the debtors, procured E. to assume the debt and execute to V. his (E.'s) note for the amount, and to secure E., plaintiff assigned to him a note and mortgage of M. for \$2,000, with an agreement that the latter should be re-transferred to plaintiff upon the payment by him to E. of the amount of his (E.'s) note to V. Subsequently, E. died, having in his hands at the time \$1,400 belonging to M. and received by E. as rents and profits of a certain ditch, of which he and M. were joint owners. Defendants were appointed administrators of E. and received the \$1,400 as assets of deceased, and afterwards from the funds of the estate paid the six hundred and seventy-one dollar note to V. The action is brought to compel defendants to re-deliver to plaintiff the \$2,000 note and mortgage, he claiming that the transaction above stated amounted to a payment by him of the debt for which they had been pledged as security. *Held*, that the facts did not show a payment of E.'s note to V. by plaintiff; that they only established that there was a balance due to M. from the estate of E., and that plaintiff was not authorized in this action to avail himself of such counter-claim of M. against the estate, as a payment on behalf of M. E. T. *Cook v. Davis*, 23 Cal. 157.

12. Counter-claim.—If the plaintiffs' cause of action is for damages for the breach on the part of the defendant, of a written contract between the parties, the defendant may interpose in his answer a counter-claim for damages for a breach of the contract by plaintiffs. *Dennis v. Bell*, 30 Cal. 247.

13. Counter-claim, what is.—A counter-claim is a cause of action in favor of the defendant, upon which he might have sued the plaintiff and obtained affirmative relief, in a separate action. *Belleau v. Thompson et al.*, Oct. T., 1867.

14. In a civil action for assault and battery, a libel published by the plaintiff concerning the defendant, cannot be set up as a counter-claim. *McDougall v. Maguire*, April T., 1868.

15. Counter-claim need not be set up, when.—An omission to assert a cross-claim, when a demand is presented for payment, does not involve a waiver of the counter-claim; nor is a failure to discharge an unfaithful servant before his term of service has expired a release of damages arising from his neglect. *Stoddard v. Treadwell*, 26 Cal. 300.

16. A party does not lose his right to bring an action for demand, which he might have pleaded as a set-off in a former action, but neglected to do. *Hobbs v. Duff*, 23 Cal. 596.

17. Cross-demands set off.—See *post*, § 49.

18. Joint and several claims.—A joint claim by two persons cannot be pleaded as a counter-claim by one defendant, but he may amend, and allege that the whole interest therein had been transferred to him. *Stearns v. Martin*, 4 Cal. 229.

19. Demands being joint and several, are not, strictly speaking, due in the same right; yet, if the legal and equitable liabilities on claims of money become vested in or may be urged against one, they may be set off against separate demands, and *vice versa*. *Russell v. Conway*, 11 Cal. 101.

20. A set-off cannot be pleaded by one of several defendants sued on joint liability. *Collins v. Butler*, 14 Cal. 223.

21. Under the forty-seventh section of the Practice Act, a claim, to consti-

tute a set-off, must be such that the party pleading it might obtain a several judgment against his adversary upon it; and this excludes a joint debt as a set-off against a several one. *Howard v. Shores*, 20 Cal. 277.

22. To justify the allowance of a set-off of joint debt due from plaintiff, and another against the individual claim of plaintiff, upon equitable grounds, it is not sufficient to show that the joint debtors owe a considerable amount, and that their property is encumbered by judgments, mortgages, and attachments, without showing that they are insolvent, or that the defendants are in danger of losing their demand. *Id.*

23. Judgments.—When judgments in different Courts are to be set off, the moving party must go into the Court in which the judgment against himself was recovered. *Russell v. Conway*, 11 Cal. 101.

24. Where two persons sue as partners in possession for a trespass on firm property, the judgment in their favor is firm assets, and the defendant in such case cannot afterwards, in equity, enjoin the collection of the judgment and set off against it a claim against one of the partners, on the ground that in fact this partner was the sole owner of the property, and alone entitled to the damages. The judgment is conclusive as to the joint ownership. *Collins v. Butler*, 14 Cal. 227.

25. Plaintiff recovered judgment against defendant for seizing, as sheriff, under execution, certain exempt property. Defendant then procured an assignment to him of the judgment on which the execution issued, and moved the Court to set off this latter judgment against the former. *Held*, that the motion was properly denied; that defendant being sued as a wrong-doer, the judgment of plaintiff for the value of the property must, as between plaintiff and defendant, be regarded as standing in place of the property, and that if defendant were allowed in this way to take advantage of his own wrong, he would practically defeat the purpose of the Exemption Law. *Beckman v. Manlove*, 18 Cal. 388.

26. Action on an appeal bond, in which defendants claim the right to offset the balance of a decree in a foreclosure suit, which they have purchased and now hold against James R. Duff and James T. Ryan and eleven other defendants in that suit, upon the ground that James R. Duff and James T. Ryan are the parties beneficially interested in the claim in suit in this action, and that they and the other eleven defendants in the decree sought to be offset, are insolvent: *Held*, that the set-off cannot be allowed, as well because of the provisions of section forty-seven of the Practice Act, which requires a counter-claim to be between parties to the record, between whom a several judgment might be had in the action, as of the provisions of sections one hundred and seventy-six and one hundred and ninety-nine, which would require a judgment for the excess to be given against the plaintiff, although, as against him, it is not claimed that defendants have any demand. *Duff v. Hobbs*, 19 Cal. 646.

27. *Held further*, that the matter set up in the answer is not a defense, legal or equitable, in any other sense than as being purely an offset, and therefore such matter cannot be relied on as an equitable defense independent of and beyond the right of offset given by the Practice Act. *Id.*

28. A decree, rendered in an action on a bond, and to foreclose a mortgage given to secure the bond, which, after reciting the amount found due on the bond, directed that the mortgaged premises be sold, and out of the proceeds, the costs and the amount found due on the bond and accruing interest be paid, and that if there was a surplus, the sheriff pay such surplus into Court, but that if the proceeds were insufficient to pay the debt, interests and costs, the sheriff should report the amount of such deficiency or balance, and that, therefore, the plaintiff have execution against the defendants, merges the original debt in such judgment, at least so far as to make it a certain and liquidated demand, existing at the date when the amount of balance was ascertained, by the report of the sheriff, sufficient as a foundation of a right of action as set-off. *Hobbs v. Duff*, 23 Cal. 596.

29. The jurisdiction of a Court of equity in relation to set-offs, is more extensive than that of common law Courts; and when the defendant in one of the judgments is insolvent, and the plaintiff in the other is not the real party in

interest, but a trustee for the insolvent defendants in the other judgment, a Court of equity will decree a set-off. *Id.*

30. Where the parties to two judgments are not the same, a Court of common law jurisdiction cannot set-off one against the other; but a Court of equity will look beyond the nominal to the real parties in interest, and adjudicate the rights of the parties accordingly. *Id.*

31. A Court of equity will not permit a *cestui qui* trust who is insolvent, to enforce and collect through his trustee, a judgment against a party who holds a just and valid demand against the *cestui qui* trust, which he has no means of enforcing or collecting if a set-off is denied. *Id.*

32. It is not necessary that the demand sought to be used as a set-off, should be in the form of a personal judgment. *Id.*

33. An action brought in a Court of equity to enforce a set-off of one judgment against another, is "an action upon a judgment or decree," within the meaning of section 17 of the Statute of Limitations, and may be brought at any time within five years of the date of the judgment or decree. *Id.*

34. Where, in the same action, two judgments were entered, one for the plaintiff for a certain sum, and one for the defendant for a less sum: *Held*, that defendant had a right to set-off his judgment *pro tanto* against that of the plaintiff, and that this right could not be defeated by any assignment by plaintiff of his judgment before application of the set-off. *Porter & Allen v. Liscom*, 22 Cal. 480.

35. Where a judgment, against which a right to set-off another judgment, rendered in the same action, exists, is assigned, the assignee may be brought into the Court upon a proceeding by petition and motion, and will be bound by an order made therein directing a set-off. *Id.*

36. A judgment in favor of a defendant for costs, based upon a finding of one of several issues in his favor by the jury, even if erroneous, is not void. While unreversed it is to be treated, for the purpose of set-off, as a valid judgment. *Id.*

37. Promissory note not subject to a set-off.—Where a negotiable promissory note, not yet due, is taken *bona fide* as collateral security for a pre-existing debt, it is not subject to any defense existing at the date of the assignment between the parties. *Payne v. Bensley*, 8 Cal. 260. [Affirmed in *Robinson v. Smith*, 14 Cal. 94.]

38. Partnership demands.—A debtor has a right to purchase cross demands against a partnership, and to set them up as a defense to a debt due by him to a partnership. *Nagles v. Minturn*, 8 Cal. 540; *Marys v. Jones*, 9 Cal. 335.

39. In an action at law to recover damages for failure to comply with a covenant to indemnify plaintiff against liabilities, the defendant cannot set up, as a counter-claim, demands which were matters of partnership between the parties. *Haskell v. Moore*, 29 Cal. 437.

40. When partners are sued as factors, it is not necessary for them to set forth, in their answer, their claim for disbursements, commissions, etc., by way of set-off. *Lubert v. Chauviteau*, 3 Cal. 463.

41. Set-off in equity.—A Court of equity, upon bill filed, will compel an equitable set-off when the parties have mutual demands against each other, which are so situated that it is impossible for the party claiming a set-off to obtain satisfaction of his claim by an ordinary suit at law or in equity. *Russell v. Conway*, 11 Cal. 93.

42. Equity will not set off the claim of an individual creditor of one joint owner of a judgment against the judgment; and if the judgment be partnership assets, the individual creditor has no claim to any part of it until adjustment of the firm accounts. *Collins v. Butler*, 14 Cal. 227.

43. In equity, the right of set-off depends, not on the statutes of set-off, but upon the right and the equitable jurisdiction of a Court of Chancery over its suitors. *Hobbs v. Duff*, 23 Cal. 596. See further under title "Judgments."

44. Improvements in an action of ejectment. See § 257, *post*.

45. Unliquidated damages cannot be set-off.

46. Unliquidated claim for damages not the subject of off-set, legal or equitable. *Rickelson v. Richardson*, 19 Cal. 331; *McDougal v. Maguire*, April T., 1868.

47. Liquidated demand. See *Hobbs v. Duff*, 23 Cal. 596; see *ante*, § 46, note.

48. When and how pleaded.—Under the plea of general issue, evidence of a counter claim is not admissible, but should be especially pleaded. *Hicks v. Green*, 9 Cal. 75.

49. Though certain defenses, by way of set-off, are pleaded in the answer in a very informal and inartificial manner, still, if the facts, showing that they constitute valid claims against the plaintiff, are sufficiently stated, the defenses ought not to be stricken out. See facts. *Wallace v. Bear River Water and Mining Co.*, 18 Cal. 461.

50. To entitle a defendant to set off a claim against a demand of the plaintiff he must set forth in his answer the nature of the claim which he intends to set off, and when this was not done: *Held*, that the Court below properly rejected evidence of the claim proposed to be set off. *Bernard v. Mulloy*, 1 Cal. 368.

51. Damages which do not legally result from the breach of the contract, cannot be recovered, unless they are specially claimed and set forth in the pleading; thus, damages sustained by vendee of goods by reason of his inability to comply with a contract made by him with a third person, do not legally result from a breach of the contract of his vendor to deliver the goods to him; and, in an action by his vendor against him, cannot be recouped from the plaintiff's claim, unless such damages are specially alleged and set forth in an answer. *Cole v. Swanston*, 1 Cal. 51.

52. Verdict, in case of a counter-claim. See § 176, *post*.

53. Judgment, in case of a counter-claim. See § 199, *post*.

§ 48. Cross demands.

When cross demands have existed between persons, under such circumstances, that if one had brought an action against the other, a counter claim could have been set up, neither shall be deprived of the benefit thereof, by the assignment or death of the other; but the two demands [shall] be deemed compensated, so far as they equal each other.

See *ante*, § 47, note.

§ 49. Several defenses.

The defendant may set forth by answer as many defenses and counter claims as he may have. They shall each be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished.

N. Y. Code, § 150; Abb. Forms, 718.

1. If inconsistent defenses be set up, the defect must be reached by motion to strike out, or in some cases by demurrer. And if no objection be taken to the answer on this ground, defendant, on the trial, may rely on any of his defenses as under the old system. *Kink v. Cohen*, 13 Cal. 623. [Same ruling repeated in *Holm v. Roach*, 25 Cal. 37.]

2. Several defenses, inconsistent with each other, may, under proper circumstances, be set up in a verified answer. *Bell v. Brown*, 22 Cal. 671.

3. In an action to recover a mining claim, the complaint, duly verified, alleged title and possession in plaintiffs on a certain day. The answer, also

verified, denied that plaintiffs ever had either title or possession, and afterwards averred that if plaintiffs ever had a title to the claim they had abandoned and forfeited it before defendants' entry. At the trial, on motion of plaintiffs, the Court ordered defendants to elect on which of the above defenses they would rely, and defendants having, after excepting to the order, elected to rely upon their denial, were precluded from introducing proof of the abandonment and forfeiture. *Held*, that the action of the Court was error; that defendants had the right to set up both defenses in their answers and support both by proof. *Id.*

4. The inconsistent defenses which are allowed to be pleaded in a verified answer, are not such as require in their statement a direct contradiction of any fact elsewhere directly averred. They are those in which the inconsistency arises rather by implication of law, being in the nature of pleas of confession and avoidance, as contradistinguished from denials, where the party impliedly or hypothetically admits for the purpose of that particular defense, a fact which he notwithstanding insists does not in truth exist. *Id.*

5. Where there are several defenses in an answer, an admission made in one is not an admission for all the purposes of the case, but for the sake of the plea merely. *Siter v. Jewett*, July T. 1867.

6. Each denial of an answer must be regarded as applying to the specific allegation it purports to answer, and not as forming a part of an answer to some other specific and entirely independent allegation. *Racoult v. Rene*, 22 Cal. 450.

7. See *ante*, § 46; "answer must be consistent."

§ 50. *Demurrer to answer, and sham and irrelevant defenses.*

When the answer contains matter in avoidance, or a counter-claim, the plaintiff may, within the number of days in which the defendant is by the summons required to answer, to be computed from the time of the service of a copy of such answer, demur to the same for insufficiency, stating therein the grounds of such demurrer; and when the answer contains a cross complaint, the parties against whom relief is therein demanded may demur or answer thereto within the like period. Sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant, or immaterial, may be stricken out, upon motion, upon such terms as the Court, in its discretion, may impose.

¹Amended, 1854, 85; 1860, 299; 1862, 562; 1866, 702. See Rule XX for San Francisco County; also Rules XVIII and XIX; N. Y. Code, § 152; Abb. Forms, No. 1096, 1153-1166—Form of notice of motion.

1. Complaints, irrelevant matter, etc., and motions concerning. See *post*, § 57.

2. Cross complaint, when to be replied to.—In respect to matter in evidence and to counter-claims, the rule is the same as before the amendments of 1866. Those amendments introduced a new pleading, called a cross complaint. When the answer contains a cross complaint, it must be replied to, so far as the cross complaint is concerned, or the matters therein alleged will be taken as confessed; but in no other respect is the plaintiff required to reply to the answer. *Herold v. Smith*, Oct. T. 1867.

3. Sham answers, what are.—A sham answer is one good in form, but false in fact, and not pleaded in good faith. It sets up new matter which is false. *Piercy v. Sabin*, 10 Cal. 22.

4. Plaintiff sued on a note made by defendants to his order, the complaint not being verified, but setting out the note. Defendants pleaded payment. Plaintiff, on affidavits that the plea was false and pleaded in bad faith, moved to strike out the answer, and for judgment. Granted. *Held*, that the ruling of the Court was right; that, under the fiftieth section of the Practice Act, "sham" answers and defenses are such as are good in form, but false in fact, and pleaded in bad faith; and that such answers, when consisting of affirmative defenses, should be stricken out. *Gostorf v. Thaffe, McCall & Co.*, 1 Cal. 385.

5. If the complaint avers that defendant made and delivered the note to plaintiff, and that plaintiff is still the owner and holder, and the answer denies that plaintiff is the owner and holder, and the plaintiff introduces affidavits showing, by a statement of facts, that the note is his, and the defendant's counter-affidavits merely state that the answer is true and was put in good faith, the answer is sham, and should be stricken out as such. *Wedderburn v. Rogers*, 32 Cal. 569.

6. Irrelevant, redundant and immaterial allegations in answers. An unessential, or what is the same thing, an immaterial allegation, is one which can be stricken from the pleading without leaving it insufficient, and need not be proved or disproved. Whether an allegation be material, may be determined by the question—"Can it be made the subject of a material issue?" In other words, "If it be denied, will the failure to prove it decide the case in whole or in part?" If it will not, then the fact alleged is not material. *Green v. Paine*, 15 Cal. 411.

7. In an action for the seizure and conversion of a bag of gold coin, the complaint, after the usual averments, went on to detail the manner of the seizure with the incidents occurring on the street at the time, and everything done by defendants, plaintiff and the "crowd" relating to or constituting the evidence of the wrongful conversion: *Held*, that this narration should have been stricken out, on motion, as irrelevant and redundant matter. *Id.*

8. In an action to recover damages for the diversion of the water of a stream from plaintiff's mills, an averment as to the precise quantity of water required for the use of the mills, and to which plaintiffs claimed to be entitled, is an immaterial averment; and a recovery of damages would not establish plaintiff's right to the exact quantity of water claimed, so as to be *res judicata* in a subsequent suit. *McDonald v. Bear River and Auburn W. & M. Co.*, 15 Cal. 143.

9. Suit for services as agent of defendant under a contract. Defendant's answer sets up a violation of the contract on the part of the plaintiff, and a certain other matter, amounting to a tort on his part; as conspiracy to have property of defendant sold, and bought in by him; circulating false reports that defendant was bankrupt, its affairs a swindle, etc. *Held*, that this last portion of the answer was properly stricken out, on motion of plaintiff. *Baker v. Sierra Nevada Lake Water and Mining Co.*, 18 Cal. 171.

10. In an action to abate a nuisance, caused by the running a ditch for the conveyance of water across the land of the plaintiff, the defendants set up, among other things, the following: "That said tract of land is situated in the heart of the mineral regions of said State, and is a part of a public domain belonging to the Government of the United States, and that said government has never granted or conveyed the same, or any part thereof, to said plaintiff; they further say, that their said ditch was constructed in the summer of 1855, and has been used ever since, and still is, for the purpose of conveying the water of the South Fork of the American river from a point about five miles above said land to gold mining localities lower down, and in the vicinity of said stream, there to be used for gold mining purposes; that the same is fourteen miles in length, and was constructed for the purposes aforesaid at a cost to said defendants of about \$20,000," which allegations were stricken out, on motion of plaintiff's attorney. *Held*, that they were properly stricken out, as irrelevant, for, if true, they constitute no defense to the action. *Weimer v. Lowery*, 11 Cal. 104.

11. Sham and irrelevant and inconsistent answers and defenses and irrelevant, redundant and immaterial matter may be stricken out on motion.—It is no defense to a note, given by one partner to another,

for his interest in land held jointly by both, that the payee of the note had deceived his partner, the maker, in the division of partnership stock, was indebted therefor in an amount equal to or greater than the sum due on the note. *Cass v. Marcy*, 6 Cal. 276.

12. When such a defense was set up in the answer, in an action on the note: *Held*, that all of the answer, except that portion admitting the execution of the note and denying the indebtedness, was properly stricken out. *Id.*

13. In an action for the purchase money of land conveyed by deed, without covenants, want of title in the vendor is no defense, unless the vendee has been evicted. *Fowler v. Smith*, 2 Cal. 39.

14. The want of reasonable care on the part of another, who is injured by the breaking, cannot be set up in defense to an action for damages for the injuries thus suffered in the breaking of defendants' dam. *Fraler v. Sears & Son Water Co.*, 12 Cal. 555.

15. If inconsistent defenses are set up in an answer, the defect must be reached by motion to strike out, or by demurrer; and if no objection be taken to the answer on this ground, defendant may, on the trial, rely on any one of these defenses. *Uridias v. Morrill* (No. 2), 25 Cal. 35.

16. Allegations in a complaint which are absurd, and the truth of which is impossible, and which are inconsistent with other allegations in the same complaint, may be disregarded as surplusage. *Sacramento Co. v. Bird*, 31 Cal. 66.

17. Matter contained in an amended complaint is not irrelevant or redundant to a cause of action set out in the original complaint in the same action. *Nevada County and Sacramento County Canal Co. v. Kidd*, 28 Cal. 673.

18. If a complaint be based upon a written contract, a correct copy of which is attached to and made a part of the complaint, and if the averments of the complaint put a false construction in law upon the terms of the contract, the complaint will not for that reason be bad, but the erroneous allegations will be regarded as surplusage. *Stoddard v. Treadwell*, 26 Cal. 300.

19. Where the husband and wife are joined as plaintiffs, and the contract sued on and set forth in the complaint was made between the husband only and the defendants, the name of the wife as plaintiff was mere surplusage, and not a defect of parties under the Code, and might have been stricken out on notice, if insisted. *Warner and Wife v. Steamship Uncle Sam*, 9 Cal. 697.

20. In a suit for the recovery of the purchase money of land, founded on a contract, in which the plaintiff contracted to deliver a warranty deed for the land, the defendant, in his answer, denies that the plaintiff was the lawful owner, or that he had any title to the land. *Held*, that the averment was irrelevant. *Thayer v. White*, 3 Cal. 228.

21. The only allegations essential to a complaint are those required in stating the cause of action. Allegations inserted for the purpose of intercepting and cutting off an anticipated defense, are superfluous and immaterial, and do not require an answer. *Canfield v. Tobias*, 21 Cal. 349.

22. Complaints, redundant matter, etc.—See § 57.

23. Practice, motion to strike out, how and when.—Where the plaintiff claims that all the denials are bad, if the answer contains no new matter, he may test the sufficiency of the denials by a motion for judgment upon the pleadings, or by motion to strike out the answer on the ground that it is sham. If some of the denials are deemed good, and the others bad, he may move to strike out the latter. Answers consisting of denials, which do not explicitly traverse the material allegations of the complaint, we hold so far sham and irrelevant within the meaning of the statute. *Gay v. Winter*, Oct. T., 1867.

24. The complaint alleged the making of a note and the indorsement thereof, and the answer was a general denial in the terms of the old general issue in *assumpsit*, that the defendant undertook and promised, in manner and form, etc. *Held*, that the plaintiff would have been entitled to judgment on a motion in the Court below to strike out the answer as a nullity; but, *Held*, further, that he should have raised his objection to the answer in the Court below and had it passed upon, and that having rested his cause at the trial on the ground of want of an affidavit, he will not be permitted to say

here, for the first time, that the answer does not, in a proper form, controvert the allegations of the complaint. *Grogan v. Ruckle*, 1 Cal. 193.

25. Inability of counsel to obtain defendant's verification in time, may be good ground for an extension of time to answer, but cannot avail in resisting a motion to strike out, and for judgment after the answer is filed. *Drum v. Whiting*, 9 Cal. 422.

26. If inconsistent defenses be set up, the defect must be reached by motion to strike out, or in some cases by demurrer; and if no objection be taken to the answer on this ground, defendant on the trial may rely on any of his defenses, as under the old system. *Klink v. Cohen*, 13 Cal. 623.

27. If every fact essential to the claim or defense be not stated, the adverse party may demur; and if any fact not essential to the claim or defense—in other words, any except issuable facts be stated, the adverse party may move to strike out the unessential parts. *Green v. Palmer*, 15 Cal. 411.

28. If an answer is filed, raising an issue or issues, and a trial is had, and witnesses are sworn and examined, and the Court takes the case into consideration, it cannot then strike out the answer of the defendant and enter his default, and render judgment for plaintiff for the amount claimed in the complaint. *Abbott v. Douglass*, 28 Cal. 295.

29. Parties moving to strike out must specify the objectionable matter, with precision. *Watts v. Crawford*, Oct. T., 1867.

30. Surplusage.—The averments in a complaint of "unlawful and wrongful," as applied to the entry upon the premises and the cutting down of the timber, and to the removal and detention of the same, may be stricken out as surplusage. *Halleck v. Mixer*, 16 Cal. 574.

31. Superfluous matter in a complaint, when inserted by itself, should be struck out or disregarded, as surplusage. *Boles v. Cohen*, 15 Cal. 150.

32. What should not be stricken out.—Though certain defenses, by way of set-off, are pleaded in the answer in a very informal and inartificial manner, still, if the facts showing that they constitute valid claims against the plaintiff are sufficiently stated, the defenses ought not to be struck out. *Wallace v. Bear River Water and Mining Co.*, 18 Cal. 461.

33. In all cases not within the exception of the statute, an answer without a verification to a complaint, duly verified, may be stricken out on motion; and application for judgment, as upon a default, may be made at the same time. *Drum v. Whiting*, 9 Cal. 422.

34. The motion in this case to strike out the answers because denying or information and belief, and for judgment on the complaint: *Held*, to be properly overruled. *Comerford v. Dupuy*, 17 Cal. 308.

35. A demurrer cannot be stricken out on motion as a sham and irrelevant defense. A demurrer can be disposed of in no other way than by the regular mode. *Larco v. Casanueva*, 30 Cal. 560.

36. A verified answer, which in any part contains a distinct denial of a fact material to plaintiff's recovery, cannot, whatever its defects, be treated as a nullity, so as to entitle plaintiff to judgment on the pleadings. *Ghirardelli v. McDermott*, 22 Cal. 539.

37. If the answer has the signature of the attorney of record, and that of an associate attorney attached to it, the Court will not strike it out. The Court will not try the question, whether the signature of the attorney of record was put there by himself or by his associate without his authority. *Watson v. Cleveland*, 30 Cal. 192.

38. An answer filed after the time for answering has expired.—The Court in its discretion may strike it out or retain it, or permit another to be filed; but plaintiff cannot, as of right, have such answer struck out. For these purposes defendant is not in default until his default has been actually entered in accordance with the statute. *Bowers v. Dickerson*, 18 Cal. 420.

39. How to defend motion to strike out.—When plaintiff moves on affidavit to strike out a defense as "sham," the affidavit of defendant that his defense is *bona fide* will defeat the motion. *Gostorfs v. Tuaffe, McCahill & Co.*, 18 Cal. 385. [See *Wedderspoon v. Rogers*, 32 Cal. 569, where all the authorities are collected.]

40. *Query*: Whether this section of the Practice Act applies to any but affirmative defenses. *Id.*

41. Inability of counsel to obtain defendant's verification in time, may be good ground for an extension of time to answer, but cannot avail in resisting a motion to strike out, and for judgment after the answer is filed. *Drum v. Whiting*, 9 Cal. 422.

§ 51. *Pleadings to be verified.*

Every pleading shall be subscribed by the party, or his attorney, and when the complaint is verified by affidavit, the answer shall be verified also, except as provided in the next section.

¹Amended 1860, 299; 1862, 562; N. Y. Code, § 156.

1. An attorney in fact, who is not an attorney at law, cannot sign his name to a complaint for his principal as "plaintiff's attorney," and an action so commenced is void, as instituted without authority by an entire stranger to the plaintiff. *Dixey v. Pollack*, 8 Cal. 570.

2. An answer unverified to a verified complaint may be stricken out on motion, and an application for a judgment as upon default may be made at the same time. *Drum v. Whiting*, 9 Cal. 422.

3. By verification of the complaint, the plaintiff can prevent the defendant from interposing a general denial in suits on promissory notes or bills of exchange, by requiring a sworn answer. *Brooks v. Chilton*, 6 Cal. 640.

4. The objection to the want of verification of a complaint, where verification is required by statute, must be taken either before answer or with the answer. *Greenfield v. Steamer Gunnell*, 6 Cal. 67.

5. A party is not required to deny an indorsement under oath. An indorsee cannot give notes in evidence without proof of their indorsement. *Youngs v. Bell*, 4 Cal. 201; 18 Cal. 391.

§ 52. *Pleadings, when not to be verified.*

The verification of the answer, required in the last section, may be omitted when an admission of the truth of the complaint might subject the party to prosecution for felony or misdemeanor.

¹Amended, 1860, 299; 1862, 562. N. Y. Code, § 157.

§ 53. *Copy of instrument, when deemed admitted as genuine.*

When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the answer denying the same be verified.

1. This section does not extend to other parties than those who are alleged to have "signed" the instrument. *Heath v. Lent*, 1 Cal. 411.

2. Where, in an action against an administrator, the complaint is founded on an instrument alleged to have been executed by the intestate, it is not necessary, under the statute, that the administrator should deny the signature of the intestate on oath. It must be proved. *Id.*

3. A copy of the note sued on being attached to and made part of the complaint, the answer, not verified, admits the genuineness and due execution of

the note, and entitles the plaintiff to judgment. *Horn v. The Volcano W. Co.*, 13 Cal. 62.

4. In a suit on a note, the complaint containing the note or a copy, a denial of indebtedness is no denial at all. *Kinney v. Osborne*, 14 Cal. 112.

5. If a copy of the bond sued on is set out in the complaint, an answer denying its execution which is not verified admits its due execution. *Sacramento County v. Bird*, 31 Cal. 66.

6. If the complaint contains a copy of the note sued on, and is not verified, and the answer denies its execution, but is not sworn to, the note is admissible in evidence without proof of the genuineness of the signature. *Corcoran v. Doll*, 32 Cal. 83.

7. The failure to deny, under oath, the execution of a note, when copied into the complaint or annexed to it, amounts, under the statute rules of practice, to the admission of its execution. *Burnet v. Stearns*, Oct. T. 1867.

8. When it is found or admitted that the note upon which the suit is brought was made by the alleged maker, all the terms of the promise, including the kind of money in which payment is to be made, is to be ascertained by an inspection and construction of the instrument. *Id.*

§ 54. ¹When deemed not admitted.

When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the plaintiff file with the clerk, five days before the commencement of the term at which the action is to be tried, an affidavit denying the same; *provided*, that the due execution of the instrument shall not be deemed to be admitted by a failure to controvert the same on oath, as prescribed in this and the last preceding section, unless the party controverting the same is, upon demand, permitted to inspect the original before filing such answer.

¹ Amended 1860, 300; 1862, 562; 1866, 702.

1. Exhibits attached to an answer consisting of copies of the pleadings and proceedings in an action in the United States Circuit Court, need no further verification than what arises from the averment in the answer, that they are such copies; that no distinct verification of them is requisite; and were it otherwise, the certificate of the United States Circuit Court clerk is sufficient. *Ely v. Frisbie*, 17 Cal. 256.

§ 55. Pleadings, how and by whom verified. (a.)

In all cases of the verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated, on his

(a) STATUTES 1863-4, 261.

SECTION 2. In any civil action or proceeding whatever, wherein the State or the people of the State is a party plaintiff, or any officer of the State, on its behalf or in his official capacity, is a party plaintiff or defendant, it shall not be necessary to verify any pleading or paper used or filed therein on the part of the State, or the people of the State, or any state officer in his official capacity or on behalf of the State, but such pleading and paper shall have the same effect in all respects as if the same were verified.

information or belief, and as to these matters, that he believes it to be true. And where a pleading is verified, it shall be by the affidavit of the party, unless he be absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney, or other person verifying the same. When the pleading is verified by the attorney, or any other person except the party, he shall set forth in the affidavit the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; or when the State, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts, except that in actions prosecuted by the Attorney General in behalf of the State, the pleadings need not, in any case, be verified.

N. Y. Code, § 157, Baneroff's Forms, No. 522. Abb. Forms, Nos. 162, 169.

1. **Belief, meaning of.**—The word "belief" is to be taken in its ordinary sense, and means the actual conclusion of the party drawn from information. Positive knowledge and mere belief cannot exist together. *Humphreys v. McCall*, 9 Cal. 59.

2. **Verification, when sufficient.**—If the pleading does not contain a statement of any matter on information and belief, there can be no occasion for any expression of belief in the affidavit as to any such matter. The object of the verification is to insure good faith in the averments of the party. If he avers matters positively, the verification will be sufficient if his affidavit states that the pleading is true of his own knowledge; if he aver matter "upon information and belief," or "upon information or belief," the verification will be sufficient if his affidavit states that as to the matters thus alleged he believes the pleading to be true. To require anything further, would be to sink the evident spirit and object of the statute into a mere observance of its letter. It was not necessary that the verification should have been made by both of the plaintiffs. The affidavit of one of them was sufficient. *Patterson v. Ely*, 19 Cal. 28.

3. **Defendants in this case, in answer to a rule to show cause why an injunction should not issue, filed their answer denying fully the allegations of the complaint, and verified in substance thus:** "Wm. H. P., one of the defendants, being sworn, says his co-defendant B. left this State for the State of New York before the complaint herein was filed, and is not in this State; that the foregoing answer is true of this defendant's own knowledge, except as to the matters therein stated to be upon the information and belief of defendants, and as to these matters, he, the defendant believes, the same to be true." *Held*, that the verification of the answer, though not complying in form with the exact language of the statute, is sufficient to entitle the answer to be used as an affidavit. *Ely v. Frisbie*, 17 Cal. 250.

4. **Where, in ejectment, the verification to the complaint, made by one of the plaintiffs, is that the foregoing complaint is true of his own knowledge, except as to the matters therein stated on the information and belief of plaintiff, and as to the matters he believes it to be true:** *Held*, that the verification is sufficient, although the person making the oath does not state that he has read the complaint, or heard the complaint read, and know the contents thereof. *Id.*

5. **If a pleading does not contain a statement of any matters on informa-**

tion or belief, there is no occasion for any expression of belief in the verification as to any such matters. *Patterson v. Ely*, 19 Cal. 28.

6. The object of the verification is to insure good faith in the averments of the party. If he aver matters positively, the verification will be sufficient if his affidavit state that the pleading is true of his own knowledge; if he aver matters "upon information and belief," or "upon information or belief," the verification will be sufficient if his affidavit state, as to the matters thus averred, he believes the pleading to be true. *Id.* A verification to a complaint is sufficient, though made by only one of the plaintiffs. *Id.*

7. When verification may be omitted.—The verification of an answer may be omitted whenever the defendant would be excused from testifying as a witness to the truth of any matter denied by such answer. *Drum v. Whiting*, 9 Cal. 422.

8. Objections to verifications, how taken.—The objection to the want of verification of a complaint, where verification is required by statute, must be taken either before answer or with answer. The filing of an answer is a waiver. *Greenfield v. Steamer Gunnell*, 6 Cal. '69.

9. Verification may be allowed before or at the trial.—To a complaint verified, the defendant filed a copy of the original verified answer by mistake; parties took depositions under the pleading, and subsequently went to trial. After the close of the plaintiff's evidence, his counsel then for the first time brought the mistake to the notice of the Court by moving for judgment by default, which motion the Court sustained, and refused to allow defendant to then verify his answer. *Held*, that the Court erred, and should have allowed the defendant to have verified his answer. *Arrington v. Tepper*, 10 Cal. 464.

10. When the complaint is verified, it is no error to allow the defendant to verify his answer before trial, unless it is shown that the plaintiff is thereby taken by surprise. *Angier v. Masterson*, 6 Cal. 61.

11. Answer may be stricken out, when.—An answer unaccompanied by a required verification may be stricken out, and judgment ordered for plaintiff as upon a default. *Drum v. Whiting*, 9 Cal. 423.

12. Amendment.—To a complaint against three persons upon a promissory note executed under a firm name, one of the defendants answered, denying his liability and that he was one of the firm by whom the note was executed. Neither of the pleadings were verified. When the cause came on for trial plaintiff moved to strike out defendant's answer for want of verification; and pending the motion, defendant asked leave then to verify the answer. The Court denied defendant's motion, and struck out the answer. *Held*, that the refusal by the Court to allow the verification was such an abuse of discretion as to amount to error. *Lattimer v. Ryan*, 20 Cal. 628.

13. Before whom may be verified.—The attorney of plaintiff being a notary public, may take the affidavit verifying the complaint. *Kuhland v. Sedgwick*, 17 Cal. 123.

14. A jurat to an answer is in form and substance an affidavit, and may be taken before a County Recorder. *Pfeffer v. Riehn*, 13 Cal. 643.

15. Verification by one of several plaintiffs is sufficient. *Frisbie v. Ely*, 19 Cal. 28.

16. The State, and State officers on its behalf, need not verify. See note (a) to this section.

§ 56. Items of account. Bill of particulars.

It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged, but he shall deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded

from giving evidence thereof. The Court, or a Judge thereof, or a County Judge, may order a further account, when the one delivered is too general, or is defective in any particular.

N. Y. Code, § 158. Abb. Forms, 1101-1119.

1. When and how objected to.—It is too late to object at the trial that a bill of particulars is not properly verified by the oath of the party. The party upon whom a bill of particulars is served, if he is not satisfied with it, either because it is defective in form or in substance, or because it is not verified by the plaintiff, should immediately return it, or move the Court for a further or amended bill. *Dawson v. Smith*, 1 Cal. 437.

2. If he does not, he cannot proceed as if no bill of particulars was rendered. *Providence Tool Company v. Prader*, 32 Cal. 634.

3. To suit on a note, defendant in general terms, without items, set up an account for work and labor, and for money paid, etc. Plaintiff asked for a copy of the account, which defendant furnished. Plaintiff gave notice that he would move the Court "for a further account of particulars," etc.; and, on hearing, the Court ordered that "defendant furnish said further bill," which he did. On the trial, plaintiff ordered his note, and rested. Defendant offered evidence of the account set up in the answer, to which plaintiff objected, on the ground that "defendant had not furnished an additional bill of particulars," and the Court ruled out the evidence. Held, that the Court erred: first, because the order for a further account was defective, in not stating the particulars in reference to which a further specification was required; and because, second, if the bill of particulars delivered under the order of the Court was not satisfactory, and plaintiff intended to object to any evidence upon the subject, he should have obtained, previous to the trial, an order excluding such evidence. *Conner v. Hutchinson*, 17 Cal. 280.

4. Without an order before the trial, excluding evidence of the account in such cases, the Court cannot on the trial exclude. *Id.*

5. Where a copy of the account sued on, or set forth in the answer, is called for under the fifty-sixth section of the Practice Act, the items of the account furnished must be set forth with as much particularity as the nature of the case admits of; but the law does not require impossibilities, and if the party gives the items as definitely as he can, he does not forfeit his rights because of his inability to comply with a further demand for particulars. *Id.*

6. Where the complaint in *hæc verba* set forth the bill of sale, it was held to remedy a defect in the description of the quantity of the goods sold; a party must be presumed to know what was intended by his own account. *Ockrum v. Goodman*, 3 Cal. 244.

§ 57. Irrelevant or redundant matter.

If irrelevant or redundant matter be inserted in a pleading, it may be stricken out by the Court on motion of any person aggrieved thereby.

N. Y. Code, § 160.

1. A complaint, whatever may be the character of relief sought, must state only issuable facts and not mere matters of evidence. Where this rule has been violated, a motion by defendant to strike out the irrelevant matter should be sustained. *Bowen v. Aubrey*, 22 Cal. 566.

2. Immaterial matter inserted in a complaint is irrelevant, and should be stricken out as such on motion duly made. *Laroc v. Casanueva*, 30 Cal. 560.

3. Averments of derangements of title in a complaint in ejectment are matters of evidence and should be stricken out as irrelevant. *Id.* *Wilson v. Cleveland*, 192.

4. The words "duly," "wrongfully," and "unlawfully," when used in connection with issuable facts, while they do not vitiate a pleading, are surplusage, and had better be omitted. *Miles v. McDermott*, 31 Cal. 271.

5. [Conclusions of law should be stricken out, as well as all matter not necessary to be alleged, to constitute a cause of action, or establish a defense to an action.]

6. See section fifty, and authorities there cited—Nos. 6-21.

§ 58. *In real actions, how to describe property.*

In an action for the recovery of real property, such property shall be described, with its metes and bounds, in the complaint.

1. Actions for the foreclosure of a mortgage are not governed by this section. *Emeric v. Tums*, 6 Cal. 155.

2. Section fifty-eight of the Practice Act, that, "in an action for the recovery of real property, such property shall be described, with its metes and bounds, in the complaint," is directory only, for a failure to comply with which the complaint is liable to a special demurrer; but if the complaint describes the premises sufficiently otherwise to identify them according to the general rules on this subject, the plaintiff may after verdict take judgment, and the Court cannot set it aside on motion of defendant on account of this defect of pleading. *Buckman v. Whitney*, 19 Cal. 300.

3. Where a complaint in ejectment describes the land thus: "All that certain tract or parcel of land situated in Napa county, consisting of a pre-emption claim of one hundred and sixty acres of land, commonly known as the Soda Springs, and embracing said springs and the improvements thereto belonging, and being about five miles from Napa City in a northerly direction." *Held*, that the description is sufficient to support a judgment for plaintiff. *Id.*

4. Where a declaration describes land by a certain name, this is as good a description as one by metes and bounds, if it can be rendered sufficiently certain by evidence. *Castro v. Gill*, 5 Cal. 40; *Stanley v. Green*, 12 Cal. 143.

5. The following notice of a mechanic's lien does not contain such a description of the premises as the statute contemplates: "A dwelling house lately erected by me for J. W. Conner, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot No. —." The fact that Conner owned no other building on that street would not cure the defect. *Montrose v. Conner*, 8 Cal. 344.

6. In an action of forcible entry and detainer, the complaint described the premises as "about ten rods square, situated within and comprising the northwesterly corner of that certain piece or parcel of land, bounded and described as follows, to wit:" (the complaint then goes on to give the metes and bounds of a tract containing one hundred and forty-six acres) "the said ten rods square being situated from twenty to fifty feet, more or less, southeasterly from the house of defendant, and near the gate aforesaid, and near the junction of the San Bruno turnpike road with the road leading from the city of San Francisco to Hunter's Point." Said gate was where this last road passed through. The proof, among other things, showed this ten rods to be called the northeasterly instead of the northwesterly corner of the tract. The judgment for plaintiff followed the description in the complaint; defendant appeals. *Held*, that the variance in the description of the premises did not prejudice appellant; that the question was one of identity, and the fact that the corner of the small tract was called the northeasterly instead of the northwesterly corner, was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises. *Paul v. Silver*, 16 Cal. 73. See *Green v. Palmer*, 15 *Id.* 411.

7. The mining claim, being a claim on a river bar, is sufficiently described in the complaint. See facts. *Grady v. Early*, 13 Cal. 108.

8. A complaint in ejectment, describing the premises as "lot No. 1 in block No. 23, as per plot of the town of Red Bluff Land Corporation, in 1853, being on the corner of Main and Sycamore streets, 25 feet on Main by one hundred and fifteen feet on Sycamore, and running back to the alley," and specifying

the county in which they are situated by the terms "in said county," referring to the designation "county of Tehama," in the title of the suit, sufficiently describes the premises. The description by metes and bounds is required only so far as they may be necessary to identify with certainty the property. *Doll v. Feller*, 16 Cal. 432.

9. A description of real property in a complaint in ejectment, giving one of the lines bounding the premises as running due west to the source of a designated creek, is not so insufficient and indefinite as to sustain a demurrer on the ground of its alleged insufficiency. If there be in fact more than one source of the creek, that fact cannot be taken advantage of by demurrer. It can only be matter for proof on the trial. *Carpentier v. Grant*, 21 Cal. 140.

10. A description of premises in a complaint as follows: "commencing at a point in the Walnut creek, three hundred yards north of the Mount Diablo base line; thence running due east two miles; thence due south to a point; thence due west to the source of said Walnut creek; and thence down said creek to place of beginning;" *Held*, to be sufficient on demurrer. *Id.*

11. If the description of the demanded premises does not appear upon the face of the complaint to be insufficient, it is a question of fact for the Court or jury whether the description in the same will apply to the land sought to be recovered. *Moss v. Shear*, 30 Cal. 468.

12. Monumental lines or points control such as are described by course and distance only. The intention of the parties should be ascertained by a consideration of the entire description. *Piercy v. Grandall*, Oct. T. 1867.

§ 59. Judgments, how pleaded.

In pleading a judgment, or other determination of a Court or officer of especial jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

N. Y. Code, § 161; Bancroft's Forms, 483; Abb. Forms, 419-422.

1. In an action on a judgment obtained in another State, where the transcript of the judgment shows the jurisdiction of the Court on its face, it is not necessary to aver jurisdiction. *Low v. Burrows*, 12 Cal. 181.

2. A certificate of the proceedings of the Surrogate's Court of New York, which states that A. W. Bradford is Surrogate of the city and county of New York, and acting clerk of the Surrogate's Court; that he has compared the transcript of the papers with the original records in the matter of the estate of William Young, and finds the same to be correct, and a true copy of all the proceedings; and that the certificate is in due form of law—in testimony whereof he sets his hand and affixes his seal of office—is sufficient. *Id.*

3. Under the Act of Congress respecting the authentication of the record of a Court of one State to be used in another, it is only necessary that the certificate should state the main facts which are made necessary by the act, when the offices of judge and clerk are both vested in one person. *Id.*

4. In an action on a judgment obtained in another State, where the transcript of the judgment shows the jurisdiction of the Court on its face, it is not necessary to aver jurisdiction. *Id.*

5. The answer to a suit on a note set up by defendant's discharge in insolvency. Plaintiff demurred to the answer, on the ground that it did not allege that the note was described, set forth and included in defendant's schedule. *Held*, that the demurrer was not well taken; that, under section fifty-nine of the Practice Act, it was sufficient to allege in the answer that a judgment had been duly rendered, discharging defendant from the demand sued on; and that whether the demand was sufficiently described was matter

of evidence to be determined at the trial by inspection of the record. *Hawson v. Thuer*, 17 Cal. 518.

6. Courts of limited jurisdiction.—In pleading the judgment of a Probate Court, it being a Court of limited and inferior jurisdiction, it is necessary to set forth the facts which give jurisdiction. (The rule is altered by statute of 1858, p. 95, ch. 120.) *Smith v. Andrews*, 6 Cal. 652.

7. The law presumes nothing in favor of the jurisdiction of Justices' Courts, and a party who asserts a right under the judgment of a Justice, must affirmatively show every fact necessary to confer such jurisdiction. *Swain & Marsh v. Chase*, 12 Cal. 283.

§ 60. Conditions precedent, how to be pleaded.

In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading, shall establish, on the trial, the facts showing such performance.

N. Y. Code, § 162.

1. The plaintiffs held certain security on real estate for the payment of an indebtedness of M. to them, but gave up and canceled such security upon B. executing a bond in their favor, the condition of which was that B. should pay to the plaintiffs such amount, not exceeding \$4,000, as should be found due to them from M. after sale of certain goods and the winding up of the accounts of M. with the plaintiffs, the payment of which bond was guaranteed by the defendant under the same conditions expressed therein. *Held*, in an action on the defendant's guaranty, that the want of an averment in the complaint of the winding up of the accounts of the plaintiffs with M., or any averment equivalent thereto, rendered the complaint substantially defective, and judgment was given for the defendant on demurrer to the complaint. *Mickle v. Sanchez*, 1 Cal. 200.

2. The allegation that the plaintiff had fully performed, on his part, all conditions of the contract, is an allegation of performance sufficiently explicit under section sixty of the Practice Act. *Cal. Steam Nav. Co. v. Wright*, 6 Cal. 258.

3. Where A. sold a lot of land to B. and delivered possession, and in a written contract respecting the same it was stipulated, among other things, that in the event that B. should be dispossessed by legal judgment at any time within three years, A. should pay back to B. \$2,000; and should suit be brought against B. for the lot, then B. should notify A. of it, in order to enable him to assist in the defense of the title: *Held*, that the giving of the notice by B. to A. of the institution of suit against B. for the lot, was indispensable to enable B. to recover of A. on such contract. *Bensley v. Atwill*, 12 Cal. 231.

4. In a suit on such contract, B. should aver that he had been evicted after notice to A. The payment of the money is dependent on this fact. *Id.*

5. In a suit in equity to set aside a judgment by default on a return by the sheriff of personal service, on the ground that defendant in fact was not so served, and never had any notice of the proceedings, and that he had a valid defense to the action, the allegations relative to this defense showed that it was based upon an executory agreement, by the terms of which certain things were to be done by plaintiff, and in consideration thereof he was to be released from the debt for which the action was brought. *Held*, that the allegations are insufficient in this, that they do not state that any of these things were performed by him, or that he ever offered, or was, or has been at any time, ready or willing to perform the same. *Gibbons v. Scott*, 15 Cal. 284.

6. In pleading title to land under an act of the Legislature which prescribes conditions upon the performance of which the title may be recovered, it is

necessary to aver a performance of all the acts required by the statute. *People v. Jackson et al.*, 24 Cal. 632.

7. A general averment of the performance of conditions precedent, is sufficient in cases of contract, but, in all other cases, the facts showing a performance must be specially pleaded. *Id.*

8. If the contract sued on is executory, and each party has something to perform before the other can be placed completely in default, the party seeking to enforce it against the other must aver in his complaint a performance or tender of performance, or a readiness to perform, on his part. *Barron v. Friak*, 30 Cal. 486. See, further, *ante*, § 39, No. 123.

§ 61. *Private statutes, how to be pleaded.*

In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the Court shall thereupon take judicial notice thereof.

N. Y. Code, §163; Van Sant. Pleadings, 270, 496; 5 Sand. 153.

1. When a pleader wishes to avail himself of a statutory privilege, or right given by particular facts, he must show the facts; those facts which the statute requires as the foundation of the right must be stated in the complaint. *Dye v. Dye*, 11 Cal. 183.

§ 62. *Libel and slander, how stated in the complaint.*

In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall establish, on the trial, that it was so published or spoken.

N. Y. Code, § 164; Abb. Forms, 598-607.

1. Words, which on their face appear to be entirely harmless, may, under certain circumstances, convey a covert meaning wholly different from the ordinary and natural interpretation usually put upon them. To render such words actionable, it is necessary for the pleader to aver that the author of the libel intended them to be understood, and that they were in fact understood by those who read them in their covert sense. *Maynard v. Fireman's Fund Ins. Co.*, April T., 1868.

2. *Variance.*—In an action for an alleged libel, a variance between the date of the libel as set forth in the complaint, and as shown in the evidence, is not material, unless the defense is misled by it. *Thrall v. Smiley*, 9 Cal. 529.

3. *Evidence.*—In an action of slander for words spoken in the presence and hearing of the plaintiff, and immediately after the defendant had uttered the slanderous words the plaintiff replied to them, which reply the plaintiff offered to prove on the trial, and the Court refused to hear such proof: *Held*, that such ruling of the Court was error, as the reply might have qualified or explained the slanderous words, or shown in what sense they were uttered, or might have even admitted their truth. *Bradley v. Gardner*, 10 Cal. 371.

4. *Damages.*—In an action for slander, where words are charged to have been spoken of and concerning a defendant, as a clerk or tradesman, which

it is alleged was his profession, it is unnecessary to allege special damages. *Butler v. Howes*, 7 Cal. 87.

§ 63. *Answer in such cases.*

In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

N. Y. Code, § 165; Abb. Forms, 1023-1036.

1. **Justification, what must be alleged.**—To constitute a justification in an action for libel, the answer must aver the truth of the defamatory matter charged. It is not sufficient to set up facts which only tend to establish the truth of such matter. Without an averment of its truth, the fact detailed can only avail in mitigation of damages. *Thrall v. Smiley*, 9 Cal. 529.

2. **Malice.**—It is error for the Court to instruct the jury "that when a person injuriously slanders the title of another, malice is presumed." *McDaniel v. Baca*, 2 Cal. 326.

3. **Proof by defendant.**—The defendant may prove the reply by plaintiff immediately after defendant uttered the slanderous words. *Bradley v. Gardner*, 10 Cal. 371.

§ 64. *What causes of action may be joined.*

The plaintiff may unite several causes of action in the same complaint, when they all arise out of:

1st. Contracts express or implied.

2d. Claims to recover specific real property, with or without damages, for the withholding thereof, or for waste committed thereon, and the rents and profits of the same: or,

3d. Claims to recover specific personal property, with or without damages for the withholding thereof: or,

4th. Claims against a trustee by virtue of a contract or by operation of law: or,

5th. Injuries to character: or,

6th. Injuries to person: or,

7th. Injuries to property. But the causes of action so united shall all belong to one only of these classes, and shall affect all the parties to the action, and not require different places of trial, and shall be separately stated:

Provided, however, that an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person.

¹ Amended 1855, 196; N. Y. Code, § 167; Abb. Forms, 148.

1. **First subdivision.**—There was no misjoinder of cause of action in this

See
29 N. Y.

23 Cal. 196

case. When a defendant pleads another suit pending between the same parties, and for the same cause of action, and it appears that no summons was ever issued upon the complaint, and that there was no voluntary appearance on the part of the defendant in such suit: *Held*, that there was no suit pending, and consequently no misjoinder of causes of action. *Weaver v. Conger*, 10 Cal. 233.

2. Where a suit was brought to foreclose a mortgage executed by husband and wife to secure a note made by the husband alone, and the complaint prayed for judgment against the husband for the amount of the note and interest, and a decree against both defendants for the sale of the mortgaged premises: *Held*, there was no misjoinder of actions, and the complaint was not demurrable on that ground. *Rollins v. Forbes and Wife*, 10 Cal. 299.

3. Where a party is entitled to both legal and equitable relief, in a matter arising out of the same transaction and founded on the same instrument in writing, the whole matter may be litigated and finally settled in the same action. *Gray et al. v. Dougherty et al.*, 25 Cal. 266.

4. It is not an improper joinder of two causes of action to sue the indorser of a promissory note on his liability as such, and to ask a decree against the mortgagor foreclosing a mortgage, given to secure the same note by another party. *Eastman v. Terman*, 24 Cal. 382.

5. If a mortgage is assigned by the mortgagee to another party as a pledge for the payment of a debt due the other party by the mortgagee, it is not an improper joinder of several causes of action for the assignee to unite in the same action his claim against the mortgagor and mortgagee and persons having liens or encumbrances upon the mortgaged property, and make them all parties. *Farewell v. Jackson*, 28 Cal. 105.

6. A complaint which contains a count setting forth the facts attending the purchase of a county warrant by plaintiff, and charging that defendants are liable upon an implied contract to repay the purchase money, and a second count charging defendants as indorsers of negotiable paper, and a third count in the usual form for money had and received, is not demurrable on the ground of a misjoinder of causes of action. *Keller v. Hicks*, 22 Cal. 457.

7. Second subdivision.

8. Under our Practice Act, it is competent for the plaintiff to recover real property, with damages for withholding it, and the rents and profits, all in the same action, and as one cause of action. *Sullivan v. Davis*, 4 Cal. 291.

9. The union in one count of a complaint, of an allegation that defendants "have wrongfully built dams and flumes across said Mormon creek * * so as to turn the water of said creek out of its natural channel," etc., and thus divert it from plaintiff, with an allegation that defendants "have constructed gates, etc., in their said dams and flumes, which they * * hoist for the purpose of clearing out said dams and flumes of alum, stone and gravel," the accumulation of which renders the water useless to plaintiff, does not make the complaint demurrable, on the ground that it unites several distinct causes of action in one count. *Gale v. Tuolumne Water Co.*, 14 Cal. 26.

10. Seventh Subdivision.—Value of property destroyed and damages for the same may be joined. *Tendesen v. Marshall*, 3 Cal. 440.

11. In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendant's dam, and the consequent washing away of the pay-dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. *Frazer v. Sears Union Water Co.*, 12 Cal. 555.

12. The owner of land may join in the same complaint a claim for damages, as assignee, caused by a trespass on the land, while it was owned by his grantor, and a claim for an injunction for a threatened injury to the land. *Moore v. Massini*, 32 Cal. 590.

13. The plaintiff may join in the same complaint a cause of action for distinct and independent injuries to property, and the property injured in each cause of action may be the same or different, and may be either personal or real. *Id.*

14. Causes of action which may be united.—All matters arising from

and constituting part of the same transaction may be litigated in the same action. Every action, under our system, may be termed an action on the case, and any ground of relief which can be regarded as part of the case may be included in the action. *Jones and Wife v. Steamship Cortez*, 17 Cal. 487.

15. **Damages and penalty may be united.**—It is not necessary, in an action against a sheriff to recover damages (in addition to the two hundred dollars imposed by law as a penalty) for a failure to execute and return process, that two suits should be brought. Damages and the penalty may be recovered in one suit. *Pearkes v. Freer, Sheriff*, 9 Cal. 642.

16. **Tort and contract may be united, when.**—Under our system a cause of action in tort may be united with a cause of action on contract, if the two causes of action arise out of the same transaction. *Jones and Wife v. Steamship Cortez*, 17 Cal. 487.

17. **Causes of action which cannot be united.**—A claim for damages for a personal tort cannot be united with a demand properly cognizable in a Court of equity in the same action. *Mayo v. Madden*, 4 Cal. 27.

18. A claim for the possession of real property, with damages for its detention, cannot be joined in the same complaint, under any system of pleading, with a claim for consequential damages arising from a change of a road, by which a tavern keeper may have been injured in his business. *Bowles v. Sacramento Turnpike Co.*, 5 Cal. 224.

19. A complaint which joins an action of "trespass quare clausum fregit," ejectment, and prayer for relief in chancery, will be held bad on demurrer. *Bigelow v. Grove*, 7 Cal. 133.

20. A bill in equity is multifarious when several matters are united against one defendant, which are perfectly distinct and unconnected, or when relief is demanded against several defendants of several matters of a distinct and independent nature. *Wilson v. Castro*, 31 Cal. 420.

21. If the complaint in an action against a sheriff and his official bondsmen alleges only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, there is a misjoinder of causes of action. *Ghirardelli v. Bourland*, 32 Cal. 585.

22. Action to recover damages for alleged injuries to the person and property of the plaintiff, and for false imprisonment of the plaintiff's person, for forcibly ejecting him from a house and premises alleged to have been in plaintiff's possession, and keeping him out of the possession thereof. *Held*, improper joinder of causes of action. *McCarty v. Fremont*, 23 Cal. 197.

23. **Causes of action must be separately stated.**—The common counts cannot all be united in one count as one cause of action, without any specification of the sums due upon each several cause. *Buckingham v. Waters*, 14 Cal. 146.

24. Complaint in ejectment may be for two separate and distinct pieces of land; but the two causes of action must be separately stated, affect all the parties to the action, and not require different places of trial. *Boles v. Cohen*, 15 Cal. 150.

25. **Objection to misjoinder, how taken and when waived.**—Objection to the misjoinder of parties and of causes of action, should be taken by demurrer, or answer, or they are deemed waived. *Jacks v. Cooke*, 6 Cal. 164.

26. See *ante*, § 40, note, sub. 5.

§ 65. Allegation not denied, when to be deemed true.

Every material allegation of the complaint or cross complaint not controverted by the answer thereto, shall for the purposes of the action be taken as true; the statement of matters in avoidance shall on the trial be deemed controverted by the adverse party.

Amended, 1854, 86; 1860, 300; 1862, 563; 1866, 703. N. Y. Code, § 168.

1. See *ante*, § 46, No. 35, *et seq.*; No. 57, *et seq.* See *post*, §§ 66.

2. When an ultimate fact is admitted on the record, probative facts tending to establish, modify or overcome it, will not be considered by the Court. *Mulford v. Estudillo*, 32 Cal. 131.

3. Averments of mere evidence are not admitted by failure to deny them in the answer. *Racovillat v. Rene*, 32 Cal. 450.

§ 66. *What is a material allegation.*

A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

1. An unessential, or what is the same thing, an immaterial allegation, is one which can be stricken from the pleading without leaving it insufficient; and, of course, need not be proved or disproved. *Whitwell v. Thomas*, 9 Cal. 499.

2. The following question will determine, in every case, whether an allegation be material: "Can it be made the subject of a material issue?" In other words: "If it be denied, will the failure to prove it decide the case in whole or in part?" If it will not, then the fact alleged is not material. It is not one of those which constitute the causes of action, defense or reply. *Green v. Palmer*, 15 Cal. 413.

3. A statement in a complaint that the contract sued on was made payable in a specific kind of money, is an allegation of a material fact. *Wallace v. Edredge*, 27 Cal. 498; see further, *ante*, § 50, note, Nos. 6-21.

§ 67. *Amendments of course, and effect of demurrers.*

After demurrer, and before the trial of the issue of law thereon, the pleadings demurred to may be amended as of course and without costs by filing the same as amended and serving a copy thereof on the adverse party or his attorney within ten days, who shall have ten days thereafter in which to demur or answer thereto; but a party shall not so amend more than once. A demurrer shall not be deemed waived by the filing of an answer at the same time of filing the demurrer; and when the demurrer to a complaint is overruled, and there is no answer filed, the Court may upon terms allow an answer to be filed. If a demurrer to the answer be overruled, the facts alleged in the answer shall be considered as denied, to the extent mentioned in section sixty-five. Where circumstances occurring subsequently to the commencement of the action render it proper, the same may be presented by supplemental pleadings, and issue taken thereon in the same manner as in the case of original pleadings.

Amended 1854, 86; 1860, 300; 1862, 563; 1866, 703.—Abb. Forms, 1124-1150 and 1098-1100. See Rules XV, XVI, XX for San Francisco County. Supplemental Complaint, § 68 No. 89.

1. *Amendments, of course.*—If the defendant demurs to the complaint it is an error for the Court to refuse the plaintiff leave to amend his complaint before the decision on the demurrer. *Lord v. Hopkins*, 30 Cal. 76.

2. Plaintiffs, after demurrer and before trial of law thereon, are entitled to amend as of course. *Barber v. Reynolds et al.*, Oct. T., 1887.

3. Amendments after demurrer is sustained or overruled.—The party desiring amendment after demurrer sustained, must make his motion to the Court, and he cannot object on appeal that he was not permitted to amend when he made no offer. *Smith v. Yreka Water Co.*, 14 Cal. 201.

4. Where the complaint is defective, the Court should sustain the demurrer, with leave to the plaintiff to amend his complaint, and if the plaintiff then declines, final judgment should be given. *Gallagher v. Delaney*, 10 Cal. 410.

5. The defense relied on in the answer in this case being invalid, it was not error to refuse permission to amend after judgment sustaining a demurrer to the answer. Besides, the allowance of the amendment was matter of discretion, for the abuse of which only could this Court interfere. *Gilles v. Hutchinson*, 16 Cal. 153.

6. Where a demurrer to a complaint is overruled and an application subsequently made for leave to file an answer, the allowance of the application rests in the discretion of the Court, subject to review in case of its arbitrary or unreasonable exercise. The exercise of this power by the Court must in a great degree depend upon the special circumstances of each case and be so governed as to prevent delays and to promote justice. *Thornton v. Borland*, 12 Cal. 458.

7. When a demurrer is overruled, with leave to answer, it is not necessary that the order fix the time within which the answer must be filed. The Court has power to fix such time for answering as it may deem proper, but where no time is fixed, the defendant should answer within the same time as in case of service of a copy of the original complaint. *People v. Rains*, 23 Cal. 128.

8. Where a demurrer to a complaint is sustained in the Court below, and plaintiff declines to amend, and appeals from the judgment and the order sustaining the demurrer, the Supreme Court, if it affirm the judgment, cannot grant plaintiff leave to amend his complaint. *People v. Jackson et al.*, 24 Cal. 633.

9. If a demurrer to the complaint is sustained, the plaintiff is entitled to leave to amend the complaint, unless the complaint is so defective that it cannot be made good by any amendment. *Lord v. Hopkins*, 30 Cal. 76.

10. If the plaintiff amends his complaint, and the defendant obtains an order to have his answer on file stand as the answer to the amended complaint, the answer is to be treated as if filed when the order is made. *Mulford v. Escudillo*, 32 Cal. 131.

§ 68. *The Court may enlarge time to plead, correct mistakes, amend and relieve from judgments in certain cases, etc.*

The Court may, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may, upon like terms, enlarge the time for an answer or demurrer, or demurrer to an answer filed. The Court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may, upon like terms, allow an answer to be made after the time limited by this Act; and may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a

judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; and when, for any cause satisfactory to the Court, or the Judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the Court, or the Judge at chambers in vacation, may grant the relief upon application made within a reasonable time, not exceeding five months after the adjournment of the term. When, from any cause, the summons and a copy of the complaint in an action have not been personally served on the defendant, the Court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action.

¹ Amended, 1853, 276; 1866, 843.

1. Amendments by striking out or adding parties before and after judgment.—Where it appears by the plaintiff's testimony at the trial that there is a nonjoinder of persons who should have been plaintiffs, and a motion for a nonsuit is made on this ground, the Court may permit an amendment by adding the name of a co-plaintiff on such terms as may be just. *Aquiala v. Crousell*, 1 Cal. 191.

2. Where several persons conspire to obtain the land of plaintiffs, and in suit against them to recover the property, two of the defendants disclaim all interest therein: *Held*, to be no ground for dismissing the suit as to them, as they were proper parties and are liable for costs. *Dupuy v. Leavenworth*, 17 Cal. 262.

3. Whether the Court can, after ordering defendants, against whom no proof is adduced, to be stricken from the pleadings, reinstate them in the progress of the trial. *Beach v. Covilland*, 2 Cal. 237.

4. The Court may allow, after the close of plaintiff's evidence, the complaint to be amended, by adding the name of another party plaintiff, if it does not affect the substantial rights of the parties. *Polk & Hensley v. Coffin & Swain*, 9 Cal. 56.

5. Where judgment is entered against "the defendants," some of whom were not sued, though their names appeared as defendants by a mistake of the Clerk in entitling the cause, the error may be corrected in the Supreme Court, or the Court below, on motion. *Browner v. Davis*, 15 Cal. 9.

6. An alteration by the Court of a judgment, without notice, so as to include a party not served with process, if not void, is voidable at the election of the party. *Chester v. Miller*, 13 Cal. 558.

7. If a judgment entered be irregular, as embracing more parties than the testimony justifies, the proper practice is to move to correct the judgment in the Court below. *Muliken v. Hull*, 5 Cal. 245.

8. A Court may order judgment creditors, as subsequent incumbrancers, to be made parties to an action, by an amendment of the complaint, as a better course, or by petition or intervention. *Horn v. Volcano Water Co.*, 13 Cal. 70.

9. The misjoinder of parties can be corrected by amendment under the statute. *Heath v. Lent*, 1 Cal. 412.

10. Enlarging time to answer or demur.—It is always within the power of a Court, when exercising proper discretion, to extend the time fixed by

law, whenever the ends of justice would seem to demand such an extension. *Wood v. Forbes*, 5 Cal. 62.

11. Inability of counsel to obtain defendant's verification in time may be good ground for an extension of time to answer, but cannot avail in resisting a motion to strike out and for judgment after the answer is filed. *Drum v. Whiting*, 9 Cal. 422.

12. Where a demurrer to a complaint is overruled, and an application subsequently made for leave to file an answer, the allowance of the application rests in the discretion of the Court, subject to review in case of its arbitrary or unreasonable exercise. The exercise of this power by the Court must, in a great degree, depend upon the special circumstances of each case, and be so governed as to prevent delays and to promote justice. *Thornton v. Borland*, 12 Cal. 438.

13. Amendments to complaint.—The plaintiffs should be permitted, if they desire, to so amend their complaint as to present for determination their legal rights, otherwise the complaint should be dismissed. *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 145.

14. It is error to refuse to allow a plaintiff to strike out a claim for damages, without regard to the purpose which may influence him. *Grass Valley Quartz Mining Co. v. Stackhouse*, 6 Cal. 413.

15. Where the proof does not sustain the allegations of the bill, and where by the proof the complainant would be entitled to relief in a Court of equity, if his pleadings had been properly framed, an amendment should be allowed or directed, to conform the pleadings to the facts which ought to be in issue, in order to enable the Court to decree fully on the merits; and whenever this is not done it is error. *Connolly v. Peck*, 3 Cal. 82.

16. The wife is a proper party defendant in a suit to foreclose a mortgage executed upon premises claimed as a homestead. If not made such a party, she may intervene, or by permission of the Court, be allowed to file a separate answer, the plaintiff having the liberty to amend his complaint, if any matters are set up in the answer which he might wish to anticipate by further allegations. *Moss v. Warner and Wife*, 10 Cal. 296.

17. Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and a judgment by default is regularly entered, the judgment is valid. *Smith v. Billet*, 15 Cal. 26.

18. The plaintiff sued in assumpsit to recover rent for premises, the possession of which he had previously recovered by ejectment against the defendant. After the trial and verdict, which was set aside by the Court, he amended his complaint to make it in form an action of trespass for mesne profits. *Held*, this was erroneous, and should not have been permitted. *Ramirez v. Murray*, 5 Cal. 222.

19. Such an amendment would virtually change an action *ex contractu*, into an action, *ex delicto*. *Id.*

20. Facts which occur subsequent to the filing of the original complaint, and which change the liabilities of the defendants, and in consequence the character of the judgment which is sought cannot be incorporated into the original complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action. *Van Maren v. Johnson*, 15 Cal. 308.

21. If the complaint avers the ownership of land in the bed of and near the banks of a stream, and work done thereon to dig a canal and build a dam to use the waters of the stream, and is framed for a judgment to recover possession of the property from one who is averred to have ousted plaintiff, if the plaintiff asks it, he should be allowed to amend his complaint by inserting therein averments of his prior appropriation of water and a diversion by defendant, with prayer for an injunction. *Nevada County and Sacramento County Canal Co. v. Kidd*, 28 Cal. 673.

22. An amendment should be allowed to a complaint at the request of the plaintiff, so as to make it express the cause of action originally intended, but ambiguously expressed, if the intention is manifest on the face of the complaint. *Id.*

23. New matters in amended complaints.—For the purpose of deter-

mining whether new matter contained in an amended complaint is entirely foreign to the cause of action contained in the original complaint, the original complaint must receive a liberal construction. *Id.*

24. Unless new matter, inserted in an amended complaint, is entirely foreign to the cause of action in the original complaint, the question will not arise on motion to strike out, whether the amendment in the amended complaint go further than is allowed by our code of procedure touching amendments. *Id.*

25. Under our Practice Act a complaint cannot be amended in the Supreme Court so as to make it correspond with the verdict. The District Court, in a proper case before judgment, may direct the complaint to be so amended. *Hooper v. Wells, Fargo & Co.*, 27 Cal. 35.

26. The filing of a new complaint after a demurrer has been sustained, is not the commencement of a new action. *Jones v. Frost*, 28 Cal. 245.

27. Form of action cannot be changed.—The plaintiff sued in assumpsit to recover rent for premises, the possession of which he had previously recovered by ejectment against the defendant. After a trial and verdict, which was set aside by the Court, he amended his complaint, to make in form an action of trespass for *mesne profits*: *Held*, that was erroneous, and should not have been permitted. *Ramirez v. Murray*, 5 Cal. 222.

28. Amendment of complaint before summons, issued without leave. *Allen v. Marshall*, Oct. T., 1868.

29. Amended answer.—A joint claim by two persons cannot be pleaded as a counter claim by one defendant; but he may amend, and allege that the whole interest therein has been transferred to him. *Stearns v. Martin*, 4 Cal. 229.

30. The fact that new matter set up by an amendment was well known to the defendant at the time he filed his original answer, is no good reason why the amendment should not be permitted. *Pierson v. McCahill*, 22 Cal. 127.

31. An amended answer supercedes the original and destroys its effects as a pleading. *Gilman v. Coe*, 22 Cal. 356; *Jones v. Frost*, 28 Cal. 246.

32. Judgment, when, and when not set aside.—Judgment by default set aside on the ground of surprise. *Biddleman v. Keown*, 2 Cal. 243.

33. It is no ground for setting aside a judgment by default, that the defendant was ignorant of the law requiring him to answer in ten days. *Chase v. Swain, Administrator*, 9 Cal. 130.

34. An order of Court setting aside a default and judgment entered during vacation is regular and correct, when there has been no service of summons upon the defendants. *Pico v. Carrillo*, 7 Cal. 32.

35. Where two defendants are jointly sued and service had on both, the Clerk of the Court has no authority to enter judgment by default against one, and his act in so doing is without color of law and void, and may be disregarded or set aside. *Stearns v. Aguirre*, 7 Cal. 443; see 28 Cal. 651; *Welsh v. Kirkpatrick*, 30 Cal. 205; *Wilson v. Cleveland*, Id., 198; *Bond v. Pacheco*, Id., 535.

36. A judgment will not be set aside on the application of a creditor of the judgment debtor, upon the ground that the judgment was taken for more than was actually due upon the note, when it appears that a mistake of a few cents only was made in calculating the interest due upon the note. *Ziel v. Dukes*, 12 Cal. 482.

37. A mere clerical error in the judgment, not affecting the appellant, can be corrected, and is not a ground for reversal. *Anderson v. Parker*, 6 Cal. 201.

37. Case where the Court below set aside a judgment by default in ejectment, and allowed the landlords of the defendants to come in and defend. *Barrett v. Graham*, 19 Cal. 632; see *Bailey v. Tuaffe*, 29 Cal. 422, and authorities there cited.

39. Ejectment against K., claiming as owner, and R., his tenant, and L. & B., sub-lessees of R. Summons served on L. & B. only, who were in possession. No answer, and default taken. Suit dismissed as to K. and R., and judgment entered by the Court against L. & B. for restitution. K. applies on affidavit for an order vacating the judgment, and for permission to defend. *Held*, that K. had a right to be admitted to defend; and that the judgment was properly vacated for that purpose. *Roland v. Kreyenhagen*, 18 Cal. 455.

40. A defendant upon whom no service of summon was made, and against whom a judgment has been entered upon his demurrer, after an attorney had appeared and demurred for him without authority, is not entitled to have the judgment vacated, where he is informed before judgment that an attorney has appeared for him, and a long time elapses before judgment, and he does not show that he has a meritorious defense. *Seale v. McLaughlin*, 28 Cal. 668.

41. Where a plaintiff fails to appear when a cause is regularly called for trial, and at defendant's request the trial proceeds, and judgment is rendered for defendant, the Court has no power to relieve the plaintiff from the judgment, under the sixty-eighth section of the Practice Act, on the ground of mistake, inadvertence, surprise, or excusable neglect, on a motion made after the adjournment of the term at which the judgment was rendered. *Casement v. Ringgold et al.*, 28 Cal. 335. (Altered by Statute.)

42. Vacating judgment after adjournment of term.—If relief can be obtained in such cases, it must be by a motion for a new trial on the ground of accident or surprise, which ordinary prudence could not have guarded against. *Id.*

43. The sixty-eighth section of the Practice Act applies not only to cases where a judgment has been taken regularly without personal service, as upon publication of summons, but also to cases of judgments entered erroneously without any service of summons or appearance of defendant. *Lewis v. Rigney*, 21 Cal. 268.

44. Where, pending a motion by a defendant who had been served with process to set aside a judgment erroneously entered at a previous term against him and a co-defendant who had made default, the plaintiff applied to the Court to correct the judgment by striking out the name of the moving defendant, on the ground that it had been inserted by a mistake of the Clerk: *Held*, that admitting the mistake, it was within the discretion of the Court to deny so tardy an application. *Id.*

45. Where a judgment is taken by plaintiffs, in the absence of defendants and their counsel, and this absence results from a mutual and honest mistake between them as to the retainer of the latter, relief will be granted by setting aside the judgment. *McKinley v. Tuttle*, Oct. T. 1867.

46. After a conditional order to set aside a judgment, the Court, in deciding a motion to place the cause on the calendar for trial, "orders that said motion be and the same is hereby denied, and the judgment will remain:" *Held*, that this was a distinct adjudication, that the previous order had not taken effect; and held further, that this order directing the judgment remain, being the last in the case, and not having been appealed from, it deprived of all force any previous order in reference to vacating the judgment. *Gregory v. Haynes*, 21 Cal. 443.

47. A purchaser under a decree may petition to be released from his purchase or that the sale be set aside, where it has been subsequently discovered that the Court rendering the decree had not acquired jurisdiction of the subject matter; or for other reasons, that the estate directed to be sold would not pass. *Boggs v. Hargrave*, 16 Cal. 559.

48. After appeal, court below cannot amend.—When a judgment is rendered and an appeal taken, the Court below loses control over the judgment, and an order amending the judgment is erroneous. *Bryan v. Berry*, 8 Cal. 134.

49. Default, when it will be set aside.—A judgment by default will be set aside on the ground of fraud or surprise. *Bidleman v. Keown*, 2 Cal. 250.

50. An order of Court setting aside a default and judgment entered during vacation is regular and correct, where there has been no service of summons upon the defendants. *Pico v. Carrillo*, 7 Cal. 30.

51. This proceeding is expressly authorized by the sixty-eighth section of the Practice Act, and it is not necessary to file a bill in chancery to vacate the judgment. *Id.*

52. In an action of ejectment against two defendants, one who was served with summons and made default, and without any service being made upon the other, a judgment was entered against both for possession of the prem-

ies and costs. On application of the defendant not served, an order was made at a subsequent term of the Court, setting aside the entire judgment as to both defendants, with leave to the defendant not served to answer. *Held*, that this order was proper. *Lewis v. Eigney*, 21 Cal. 268.

53. The effect of such an order is not to set aside the default of the defendant who had been served, as to permit his co-defendant to defend for both. A new judgment may be at once entered by the plaintiff against the defaulting defendant. *Id.*

54. A defendant who, having suffered a default, has obtained from the plaintiff a stipulation that the default may be set aside, must use reasonable diligence in applying to the Court for the relief contemplated, or his right to it will be lost. An unexplained delay of seven years in making the application will justify the Court in refusing to enforce the stipulation. *Reese v. Matoney*, 21 Cal. 305.

55. A motion may be made to set aside a default entered by a clerk at any time before final judgment is rendered in the action, notwithstanding the Court has adjourned for the term at which the default was entered, before the motion is made to vacate it. *Wilson v. Cleveland*, 30 Cal. 192.

57. The Court does not lose jurisdiction to vacate a default because the term at which it was entered has adjourned, unless final judgment has been entered in the action. *Id.*

58. If the tenant sued in ejectment has, by neglect or design, suffered a default, the landlord may, upon a proper showing and motion in the name of the tenant, have the default set aside. *Dimick v. Deringer*, 32 Cal. 488.

59. Where the defendant moves to compel the plaintiff to elect which count of the complaint he will go to trial on, and the Court makes an order extending the time to answer until the decision of the motion, and the motion is sustained, a default of the defendant, entered by the clerk in less than ten days after the plaintiff serves notice of his election, is void, and the Court may set it aside upon suggestion, without any affidavit of merits. *Wilson v. Cleveland*, 30 Cal. 192.

60. If a defendant is actually served with process, though sued by a wrong name, a judgment by default against him is not void. *Reese v. Eigney*, 21 Cal. 268. *Walsh v. Kilpatrick* 30 Cal. 202

61. Judgment by default, will not be set aside, when.—A judgment by default will not be opened unless it be made to appear that the judgment, as it stands, is unjust. *Parrot v. Den*, Oct. T. 1867.

62. Where a case in the twelfth district was set for trial on a particular day, with the knowledge and consent of defendant's attorney, and he then, two or three days before the day of trial, goes into Alameda county to try another cause there, without making any arrangement in respect to the first case, in which on the day fixed plaintiff had judgment, no one appearing for defendant, except to state the fact of the attorney's absence, and to ask a postponement, which was denied: *Held*, that this Court will not review the action of the Court below in refusing to set aside the judgment because of the absence of said attorney. *Haight v. Green*, 19 Cal. 118.

63. A judgment by default should not be set aside on the ground of excusable neglect, because the preparation of the answer required more time than ordinary cases, and during a portion of the time the attorney was absent from town. *Bailey v. Tuaffe*, 29 Cal. 422.

64. An affidavit on a motion to set aside a default should be made by the defendant, unless good reason exists for having it made by some one else. *Bailey v. Tuaffe*, 29 Cal. 422.

65. A judgment by default should not be set aside by the Court, unless the defendant shows by competent proof that the judgment was entered through mistake, inadvertence, surprise or excusable neglect on his part; and the payment of the costs should be imposed as a condition of setting aside the judgment. *People v. O'Connell*, 23 Cal. 281.

66. Judgments and defaults, setting aside discretionary.—Where a judgment is set aside, under the sixty-eighth section of the Practice Act, and a party permitted to come in and defend, the Supreme Court will not inter-

ferre, unless there was a clear abuse of discretion in the Court below. *Boland v. Kreyenhagen*, 18 Cal. 455.

67. The refusal to set aside a judgment on the ground of surprise rests with the sound discretion of the Court below, and unless it is shown to have been an abuse of the same this Court will not interfere. *Mulholland v. Heyne-man*, 20 Cal.

68. In setting aside a judgment, the Court below will use its own discretion, and this Court will not interfere, unless in case of gross abuse. *Woodward v. Backus*, 20 Cal. 137.

69. The granting or refusing of a motion to set aside a default based upon affidavits is a matter within the proper discretion of the Court before whom the motion is made; and unless that discretion has been abused, the Appellate Court will not interfere. *Id.*

70. Although an order of the Court below setting aside, or refusing to set aside a judgment by default, rests much in the discretion of the Court, and will not be disturbed by the Appellate Court unless plainly erroneous, yet the discretion of the Court below is not a mental discretion, to be exercised *ex gratia*, but is a legal discretion, to be exercised in conformity with the law. *Bailey v. Tuaffe*, 29 Cal. 422.

71. An order vacating a judgment entered by default, and allowing a defendant to answer, will not be disturbed by the Appellate Court, except in cases of gross abuse of discretion by the Court below. *Id.*; *Hove v. Independent Co.*, 27 Cal. 72.

72. Judgment or default, form and sufficiency of the application to set aside.—No particular form is required by the statute in which application shall be made for such relief. All that is required is, that the facts shall be set forth, and if they show a case coming within the rule, it is sufficient. *The People v. Lafarge*, 3 Cal. 130.

73. An affidavit to the effect that an instrument has been materially altered, without showing in any manner in what the alteration consists, furnishes but feeble ground upon which to base a motion to set aside a judgment. *Taylor v. Randall*, 5 Cal. 79.

74. An affidavit of merits, without any averment of mistake, surprise or excusable neglect, is not sufficient to warrant the setting aside a default, where personal service of summons was made. *Harlan v. Smith*, 6 Cal. 173.

75. An affidavit by defendant that he was under the impression, when he retained counsel in a cause, that the time to answer had not expired; that he did not recollect the precise day upon which the summons and complaint were served; that he was quite ill at the time, and did not as carefully note the time as he otherwise would, is insufficient to open a judgment by default. *Elliott v. Shaw*, 16 Cal. 377.

76. Where a default has been entered for a failure to answer or demur, an affidavit by the attorney that he had prepared a demurrer, but failed to file it in time, in consequence of a mistake on his part as to the day on which the time for filing would expire, is insufficient to open the default. *People v. Rains*, 23 Cal. 128.

77. On application to set aside a default, it is necessary for the defendant to show that he has a good defense on the merits. Where the affidavit shows that the defense rests on matters appearing on the face of the complaint, it shows that the defense is of a technical character, and is therefore insufficient. *Id.*

78. An affidavit on motion to vacate a judgment by default, under the sixty-eighth section of the Practice Act, must show: first, that the default occurred through mistake, inadvertence, surprise, or excusable neglect; and, second, that the defendant has a meritorious defense. *Bailey v. Tuaffe*, 29 Cal. 422.

79. An affidavit of the attorney, on motion to set aside a default, which states that from the examination of the defendant's case, so far as he has made such examination, he verily believes that it is better than the plaintiff's, does not show that the defendant has a meritorious defense. *Id.*

80. Affidavit of merits.—A motion to set aside a judgment, and for leave to answer, will be overruled if there is no affidavit of merits. *Parrott v. Dea*, Oct. T. 1867; *Parrott v. Mahoney*, 21 Cal. 305.

81. On application by defendant to set aside a default, an affidavit by him stating that the case has been fully and fairly represented to counsel, who have advised affiant that he has a good, full and perfect defense on the merits, is sufficient on that point, without stating the facts constituting the defense. *Woodward v. Backus*, 20 Cal. 137.

82. In motions to set aside a judgment, it would be well to state the facts constituting the defense, rather than that the facts have been fully represented to counsel. *Id.*

83. An answer should accompany affidavit of merits.

84. The better practice is to prepare and exhibit to the Court the defendant's answer at the hearing of a motion to set aside a default. *Bailey v. Taaffe*, 29 Cal. 422.

85. Counter-affidavit not allowed, when.—It is not necessary that the facts constituting the defense should be detailed to the Court, in an affidavit of merits, to open a default, and where merits are shown by affidavits, in such a case, counter-affidavits on that question cannot be received. *Francis v. Com*, Oct. T. 1867.

86. Diligence in making the application to set aside a judgment or default.—The question of diligence in making an application to re-open a judgment, under the Act of April 27th, 1862, is but for the Court below to pass upon, in the exercise of a sound discretion, and the Supreme Court will not reverse the action of the Court below, except in case of an abuse of discretion. *People v. Friebe*, 26 Cal. 137; *Lewis v. Rigney*, 31 Cal. 268.

87. A defendant who, having suffered a default, has obtained from the plaintiff a stipulation that the default may be set aside, must use reasonable diligence in applying to the Court for the relief contemplated, or his right to relief will be lost. An unexplained delay of seven years in making the application will justify the Court in refusing to enforce the stipulation. *Reese v. Mahoney*, 31 Cal. 305.

88. Appearance of an attorney without authority.—Where an attorney appears without authority, and conducts the defense, the remedy of defendants is by motion for a new trial, not by motion for relief from the judgment under section 68 of the Practice Act. *McKinly et al. v. Tuttle et al.*, Oct. T. 1867.

89. Amendments by filing supplemental complaint.—Facts which occur subsequent to the filing of the original complaint, and which change the liabilities of the defendant, and in consequence, the character of the judgment which is sought, cannot be incorporated with the original complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action. *Van Maren v. Johnson*, 15 Cal. 311.

When suit is brought against a female, who subsequently marries, her husband must be made a co-defendant. But this should be done, and an averment of the marriage be made, by a supplemental complaint, and not by an amendment to the original. *Id.* See further, *ante*, § 39, No. 67, Amendments of Answer by Filing a Supplemental Answer; see *ante*, § 46, No. 172.

90. Amendments at the trial.—A Court may, in its discretion, allow a plaintiff, after the defendants have closed their case, and before the case is submitted, to supply an omission in the testimony occasioned by mistake or inadvertence; nor is such action any ground for reversal, unless it appear that injustice has been done by an abuse of discretion. *Priest v. Union Canal Co.*, 6 Cal. 170.

91. After the motion for a nonsuit, the Court may, upon terms, allow an amendment of the complaint, if it would not operate as a surprise upon the defendant; but if this is not done, the plaintiff cannot recover. *Farmer v. Cron*, 7 Cal. 135.

92. The Court may allow, after the close of plaintiff's evidence, the complaint to be amended by adding the name of another party plaintiff, if it does not affect the substantial rights of the parties. *Folk & Hensley v. Coffin & Swain*, 9 Cal. 56.

93. The answer may be verified after the close of the plaintiff's case even. *Arrington v. Tupper*, 10 Cal. 464.

94. Two defendants filed a joint plea of the Statute of Limitations, and the plea being held bad as to one defendant, the Court, on the trial, permitted the other defendant to file a separate plea of the statute. *Held*, that this was no such gross abuse of discretion as to enable the Supreme Court to revise it. *Robinson v. Smith*, 14 Cal. 254.

95. The Court below has power to grant amendments whenever, at any stage of the trial, they are necessary to the purposes of justice, and this power should be liberally exercised to secure a fair and speedy trial on the merits. *Lestrade v. Barth*, 17 Cal. 285. See *Peters v. Foss*, 16 Cal. 337.

96. When it appears by the plaintiff's testimony that there is a misjoinder of persons who should have been made plaintiffs, and a motion for a nonsuit is made on this ground, the Court may permit an amendment by adding the name of a co-plaintiff on such terms as may be just. *Acquital v. Crowell*, 1 Cal. 192.

97. A motion to amend a complaint does not come too late because made after the plaintiff has closed his testimony and the defendant has moved for a nonsuit. A motion to amend is always in time when it immediately follows an objection to the complaint or answer. *Valencia v. Couch*, 32 Cal. 340.

98. It is not error for a Court to allow pleadings to be amended so as to supply a defect or omission even after the commencement of a trial. *Gavitt v. Doub*, 23 Cal. 78.

99. If the defendant in an action to recover possession of real estate has acquired title to the demanded premises pending the litigation, and has not pleaded such title in a supplemental answer, and for that reason his evidence of such title is excluded by the Court, it is not an abuse of discretion of the Court to deny his application made during the trial, to be allowed to amend his answer so as to obviate the objection. *McMinn v. O'Connor*, 27 Cal. 248.

100. If testimony offered by the defendant is rejected by the Court because an allegation of the complaint to which it relates is not properly denied in the answer, the defendant should be allowed to amend his denial if he asks to do so. *Stringer v. Davis*, 30 Cal. 318.

101. When in the course of a trial it is discovered that pleadings are so defective that the real subject of dispute cannot be finally determined, the Court, if an application is made therefor, should allow amendments on such terms as may be just. *Id.*

102. Answer, may be verified before or at the trial.—Where the complaint is verified, it is no error to allow the defendant to verify his answer before trial, unless it is shown that the plaintiff is thereby taken by surprise. *Angier v. Masterson*, 6 Cal. 61.

103. To a complaint verified, the defendant filed a copy of the original verified answer by mistake. Parties took depositions under the pleading, and subsequently went to trial. After the close of the plaintiff's evidence, his counsel then for the first time brought the mistake to the notice of the Court, by moving for judgment by default, which motion the Court sustained, and refused to allow defendant to then verify his answer. *Held*, that the Court erred, and should have allowed the defendant to have verified his answer. *Arrington v. Tupper*, 10 Cal. 464.

104. To a complaint against three persons upon a promissory note, executed under a firm name, one of the defendants answered, denying his liability, and that he was one of the firm by whom the note was executed. Neither of the pleadings were verified. When the cause came on for trial plaintiff moved to strike out defendant's answer for want of verification; and, pending the motion, defendant asked leave to then verify the answer. The Court denied defendant's motion, and struck out the answer. *Held*, that the refusal by the Court to allow the verification was such an abuse of discretion as to amount to error. *Lattimer v. Ryan*, 20 Cal. 628.

105. After final judgment reversed.—When a final judgment, on demurrer to the complaint, sustaining the demurrer, was reversed, the plaintiff had the right to amend, on application to the Court below. *Williamson v. Blanton*, 9 Cal. 500.

106. Upon the trial, every material allegation of the complaint not specifically controverted is to be taken as true, but if the defendant supposed he had denied material allegations, and the Court sustained his view of the answer, the Appellate Court, when it reverses the judgment, may allow the Court below to exercise its discretion in permitting the answer to be amended. *Fish v. Redington*, 31 Cal. 186.

107. Amendments to pleadings should be allowed liberally, and the discretion of the Court below in permitting them will rarely be revised. *Pierson v. McOhill*, 22 Cal. 127.

108. Thus, where a judgment in favor of defendant had been reversed by the Supreme Court, on the ground that certain material evidence, which had been received in his favor, was inadmissible under his answer, and on the second trial defendant moved to amend his answer by inserting averments of new matter obviating the objection: *Held*, that as the amendment was evidently necessary to enable the defense to be fully presented, it was properly allowed by the Court. *Id.*

109. Upon the remittitur of a cause to the Court below, if the plaintiffs desire to amend their complaint so as to present their legal rights for the determination of a jury, they should be permitted to do so. *McDonald v. Bear River Water and Mining Co.*, 15 Cal. 149.

110. Amendment, *nunc pro tunc*.—A Court may at any time render or amend a judgment *nunc pro tunc*, when the record discloses that the entry on the minutes does not correctly give what was the judgment of the Court. *Morrison, Adm'r of Ramirez, v. Dapman & West*, 3 Cal. 255.

111. Entry of order of court, *nunc pro tunc*.—A Court has no power, after the adjournment of the term, to direct the clerk to enter in the minutes, *nunc pro tunc*, an order made at the adjourned term, when there is nothing in the record to show that such order was made. *Hegeler v. Henckell*, 27 Cal. 491.

112. Judgment may be entered *nunc pro tunc*.—*Swain v. Naglee*, 19 Cal. 127. Where, after the death of the appellant, the Appellate Court, not being aware of the death, render a judgment of affirmance upon a subsequent suggestion of the fact, the judgment will be vacated, and a judgment of affirmance rendered as of a day previous to the death, *nunc pro tunc*. *Black v. Shaw*, 20 Cal. 68.

113. Amendments should be made in the court below.—Errors in the computation of interest should be corrected by motion in the Court below. *Whitney v. Buckman*, 13 Cal. 536.

114. A mere clerical error in the judgment, not affecting the appellant, can be corrected, and is not ground for reversal. *Anderson v. Parker*, 6 Cal. 197.

115. On appeal taken by defendant immediately after judgment on default, on the ground of insufficiency of the affidavit of publication of summons, the Appellate Court will not disturb the judgment, the defendant having his remedy in the Courts below within six months after judgment. *Guy v. Ide*, 6 Cal. 99.

116. Record may be amended, if there is anything in the record to amend.—A Court may at any time render or amend a judgment *nunc pro tunc*, where the record discloses that it is incorrectly given as the judgment of the Court. *Morrison v. Dapman*, 3 Cal. 255. While the term lasts, the Court has power to amend the records. After the term has passed, the record cannot be amended, unless there is something in the record to amend by. *Branger v. Chevalier*, 9 Cal. 172.

117. Where, on an appeal from an order granting a new trial, the Supreme Court affirmed the "*judgment*" below, and the remittitur was issued, and then, at a subsequent term, respondent moved the Court to amend its judgment by making it read, "the order of the District Court granting a new trial is affirmed," instead of, "the *judgment* is affirmed:" *Held*, that the motion will be granted, on the principle that Courts have the power to amend clerical errors and enter a judgment *nunc pro tunc*, where the record itself discloses the error, even though the term has elapsed. Costs of the motion not allowed. *Swain v. Naglee*, 19 Cal. 127.

118. Clerical errors and misprisions with respect to entries of judicial proceedings may be corrected by the Court, even after the adjournment of the term; but the record itself must show the error. *Hegeler v. Henckell*, 27 Cal. 491.

119. Where the decree is defective in not designating the defendants who are personally liable for the debt, and the record shows who they are, the Court has the power to amend the judgment at any time by adding a clause designating the defendants who are personally liable. The proper remedy in such a case is to move to amend the judgment by supplying the omission. *Leviston v. Swan*, Oct. T. 1867.

120. Parties not concluded by the record.—In a direct proceeding in the same action to set aside a judgment under section sixty-eight of the Practice Act, the parties are not concluded by the record in any respect; on the contrary, they are allowed to show the true facts of the case by any competent evidence *alibi*, if the question had arisen collaterally. *McKinley v. Tuttle et al.*, Oct. T. 1867.

121. After the term has expired the Court loses control over cases decided, except, etc.—In this State, no motion can be entertained by a District Court to set aside a judgment on any ground, including that of want of jurisdiction over the person of defendant in the action in which judgment was entered, after the expiration of the term in which it was entered, unless the jurisdiction of the Court is saved by some motion or proceeding at the time, except in the case provided for by the sixty-eighth section of the Practice Act. *Bell v. Thompson*, 19 Cal. 706; *Suydam v. Pitcher*, 4 Id. 280; *Shaw v. McGregor*, 8 Id. 521. Five months is now allowed. See § 68.

122. A Court may, in term time or vacation, order judgment on a verdict rendered and recorded, if the motion for new trial were taken under advisement. *Hutchinson v. Bours*, 13 Cal. 50.

123. A Court will not be permitted, after a lapse of a term, to open a judgment upon motion, and render a new judgment. *Morrison, Adm'r of Ramirez v. Dapman & West*, 3 Cal. 255.

124. After the adjournment of the term, the Court loses all control over cases decided, unless its jurisdiction is saved by some motion or proceeding at the time, except in the single case provided by statute, where the summons has not been served, in which the party is allowed six months to move to set the judgment aside. *Carpenter v. Hart*, 5 Cal. 406.

125. No motion can be entertained by a District Court to set aside a judgment on any ground, including that of want of jurisdiction over the person of the defendant in the action in which the judgment was entered, after the expiration of the term in which it was entered, unless its jurisdiction is saved by some motion or proceeding at the time, except in the case provided for by the sixty-eighth section of the Practice Act. *Bell v. Thompson*, 19 Cal. 706; see also *Casement v. Ringold*, 28 Cal. 338, and authorities cited.

126. [This doctrine has been uniformly sustained by a large number of decisions, which it is unnecessary to cite. The rule, however, has been changed by legislative enactment, and five months after the adjournment of the term, is now allowed within which to obtain relief against a judgment, order, or other proceeding taken through inadvertence, etc.]

127. As to a motion for a new trial, there is no term.—The motion for a new trial may be made before or after the entry of the judgment or the making of the roll (*Ketchum v. Crippen*, 31 Cal. 365; *Pendegast v. Knox*, 32 Cal. 73), but in either event, as we held in the cases, the motion proceeds independent of the judgment, and mainly upon a record of its own, which may or may not be made at the term at which the judgment was entered, and may be made out of term as well as in. (Statutes 1863, page 336, section 25.) It is unaffected by an adjournment of the term or vacation in *fiat* until the final order granting or denying it is made; and until that time at least the record cannot be said to have been made in the sense of the rule under consideration. *Spanagel v. Dellinger*, Jan. T. 1868. (Not reported.)

128. Until then the proceedings must be considered as being "in paper," or in "the breast of the Judge," in the common law sense of those terms,

and therefore within the Judge's control on the score of amendment. In the sense of the rule in hand, as to a motion for a new trial, under our practice, there is no term of Court, or, if there is, it begins and ends with the motion. *Id.*

129. **Bill of costs, amendment of.**—Under the sixty-eighth section of the Practice Act, the Court has power, in the exercise of its discretion, to allow the amendment of a bill of costs, and the affidavit accompanying it. *Burnham v. Hays*, 3 Cal. 115.

130. Where the original bill of costs is filed within the time prescribed by act, an amendment allowed after the time relates back to the time of filing the original, of which it forms merely a part. *Id.*

131. **Findings, amendment of**

132. A judge cannot change his findings of facts in a material particular after the entry of judgment on the findings and the adjournment of the term. *Carpentier v. Gardiner*, 29 Cal. 160.

133. **Amendment of findings. Query:** Can the Court, on the argument of a motion for new trial, amend its findings filed when judgment was rendered? *Kimball v. Lochmas*, 31 Cal. 154.

134. On the day upon which the finding or decision was filed, counsel for respondent served counsel for appellant with notice of such filing; within ten days thereafter, the latter served upon the former notice of intention to move for a new trial. Within five days after notice of motion for a new trial, counsel for appellant applied to the Court for an order allowing twenty days in addition to the time allowed by the statute for that purpose, to prepare and file a statement on motion for a new trial, which was allowed, but by some mistake, the order was entered as allowing the additional time for the purpose of preparing and filing a statement "on appeal," instead of "new trial." Subsequent to this order, and before any further action on the part of the Court was called for, the Court adjourned. *Held*, that at the next term, the Court had power to amend the order. *Spanagel v. Dellinger*, on Rehearing, Jan. T. 1868.

135. **Garnishee may amend his answer.**—To subserve the purposes of justice, Courts should allow a garnishee to amend his answer whenever it appears that he has committed a mistake, or fallen into an error, which could not reasonably have been avoided. *Smith v. Brown*, 5 Cal. 118.

136. **Sheriff's return.**—A sheriff has no right, after making a return, to amend it so as to affect rights which had already vested in third parties. *Newhall v. Provost*, 6 Cal. 87; *Webster v. Haworth*, 8 Cal. 25. Courts should exercise great liberality in allowing sheriffs to amend their returns so as to make them conform to the true state of facts, and to correct errors and mistakes. *Gavitt v. Doub*, 23 Cal. 78.

137. **Summons may be amended.**—The Court may allow a summons to be amended by inserting the notice of the cause of action, etc., required by the Act of 1851. *Pollock v. Hunt*, 2 Cal. 193.

138. **Amendment, without prejudice to an injunction.**—An amended complaint may be filed without prejudice to an injunction, ordered and issued on the original complaint. *Barber v. Reynolds*, Oct. T. 1867.

139. **Amendments to conform pleadings to facts.**—Where the proof does not sustain the allegations of the bill, and where, by the proof, the complainant would be entitled to relief in a Court of equity, if his pleadings had been properly framed, an amendment should be allowed, or directed, to conform the pleadings to the facts which ought to be in issue, in order to enable the Court to decree fully on the merits; and whenever this is not done, it is error. *Connalley v. Peck*, 3 Cal. 82.

140. A party has a right to have his pleadings amended, so as to conform to the proofs. *Tryon v. Sutton*, 13 Cal. 494.

141. **Fraud.**—Fraud discovered after suit brought will entitle the party to amend his action so as to include it. *Truebody v. Jacobson*, 2 Cal. 269; *Maloon v. Eder*, 6 Id. 61.

142. It would be proper for the Court to order the complaint to be amended in an action where the defendant is arrested, so that the question of fraud should be submitted to the jury, and a judgment entered in conformity to the facts found. *Mattoon v. Eder*, 6 Cal. 61; *Davis v. Robinson*, 16 Cal. 412.

143. **Limitations, statute of.**—The plea of the Statute of Limitations is not favored, unless in aid of justice; but the Court should allow it to be pleaded at any time, when justice will be attained thereby. *Cooke v. Spears*, 2 Cal. 409.

144. It is not error for a Court to refuse permission to set up the Statute of Limitations after answering to the merits. *Stuart v. Lander*, 16 Cal. 372.

145. Two defendants filed a joint plea of the Statute of Limitations, and the plea being held bad as to one defendant, the Court, on the trial, permitted the other defendant to amend and file a separate plea of the statute. *Held*, that this was no such gross abuse of discretion as to enable the Supreme Court to reverse it. *Robinson v. Smith*, 14 Cal. 254.

146. **Referees.**—Referees have no power to allow parties to alter or amend pleadings, after a case has been referred to them. *De la Riva v. Berreyesa*, 2 Cal. 195.

147. **Relief in equity—statute remedy not exclusive.**—All Courts having chancery jurisdiction have power to set aside a judgment improperly obtained. *The People v. Lafarge*, 3 Cal. 130.

148. A party is not confined to his remedy by statute, but may resort to a Court of equity for relief against a judgment obtained by fraud or surprise. *Carpentier v. Hart*, 5 Cal. 406.

149. The assistance of equity to set aside a judgment cannot be invoked in a distinct action, so long as the remedy by motion in the original case exists. *Bibend v. Kreutz*, 20 Cal. 109.

150. The statutory remedy by motion before the Court rendering the judgment is only available during the term at which it is rendered, and to hold this remedy exclusive would often result in a denial of the most obvious justice. *Id.*

151. A complaint, in an action to set aside a judgment which contains no averment showing that relief could not have been obtained on motion, may be demurrable; but, if defendant fails to demur, and answers on the merits, and the facts supplying the defect appear in the record, the objection is waived. *Id.*

152. A party against whom an unjust judgment has been obtained through accident, mistake or fraud, may, after the adjournment of the term at which judgment was rendered, and where no want of diligence is imputable to him in seeking relief, maintain an equitable action to set aside the judgment. *Id.*

153. In cases of fraud in obtaining the judgment, the party aggrieved must proceed by a bill to impeach the original decree for fraud, etc. *Robb v. Robb*, 6 Cal. 21.

154. **Substitution of papers or pleadings.**—The substitution of papers (or pleadings in a case) is always within the discretion of the Court, and no notice of the motion to apply for it need be given, when the notice of it can be of no use. *Benedict v. Cozens*, 4 Cal. 381.

155. **Supplying the place of a lost pleading.**—If a pleading in a pending action is lost, its place can only be supplied by motion based on affidavits, showing what the lost pleading contained, and a service of personal notice upon the opposite party of the intention to move, which notice must be sufficiently explicit to advise him of what is intended as well as to enable him to controvert the affidavits submitted. *People v. Casalis*, 27 Cal. 522.

156. **Costs, by whom paid.**—Where a judgment is set aside, under the sixty-eighth section of the Practice Act, and a party permitted to come in and defend, he must be compelled to pay costs. *Roland v. Kreyenhagen*, 18 Cal. 455. Where a motion to set aside judgment is granted "on payment of all costs," the judgment remains in force until the costs are paid. *Gregory v. Haynes*, 21 Cal. 443.

157. An order vacating a judgment entered by default, and allowing the defendant to answer, should require the payment of previous costs, as a condition of setting aside the judgment. *Hove v. Independent Co.*, 29 Cal. 72.

158. When a judgment is vacated and a default opened, costs should be imposed as a condition. *Bailey v. Tuaffe*, 29 Cal. 422.

159. Great liberality exercised in allowing amendments.

160. The power of the Court, under this and other sections of the Practice Act, should be liberally exercised to mould and direct its proceedings, so as to dispose of cases upon their merits, and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right. *Roland v. Kreyenhagen*, 18 Cal. 455.

161. Amendments should be readily allowed whenever they will tend to the furtherance of justice, and the greatest liberality in this respect should be extended to pleadings in Justices' Courts. *Buller v. King*, 10 Cal. 342.

162. Amendments to pleadings should be allowed with great liberality at any time before trial, injurious delays being avoided, and the amendment being essential to a fair trial on the merits. *McMillan v. Dana*, 18 Cal. 339.

163. Amendments should be liberally allowed by inferior Courts in advancement of justice, and to secure a fair and speedy trial on the merits, and an arbitrary refusal to allow them under proper circumstances would be ground of interference by the Supreme Court. *Smith v. Yreka Water Co.*, 14 Cal. 201.

164. The legislature has not the power to legalize existing pleadings, substantially defective, without first requiring them to be amended. *People v. Mariposa Company*, 31 Cal. 196.

165. Amendments in the supreme court.—See § 345.

§ 69. Fictitious name.

When the plaintiff is ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name is discovered, the pleading or proceeding may be amended accordingly.

N. Y. Code, § 175.

1. The Practice Act permits a party defendant, whose name is unknown, to be sued by any name. *Morgan v. Thrift*, 2 Cal. 562.

2. If a bond has to be executed by the plaintiff, and is executed to the defendant by a wrong name, the latter has his remedy, and may describe it as given to him, and may show that he was the party intended. *Id.*

3. The defendant was sued and served by the name of George Mott, and judgment entered against him by the same name; afterwards, and without notice to defendant, the plaintiff, on his own motion, obtained an order from the Court to amend the judgment by altering the name of George to Gordon. *Held*, that this was error. *McNally v. Mott*, 3 Cal. 235.

4. Where a defendant is sued as James —, service was returned upon John —, and judgment was entered against J —: *Held*, to be error, unless there was something in the record to show that the person served was the person sued. *Sutter v. Cox*, 6 Cal. 415.

§ 70. Pleadings, how construed.

In the construction of a pleading for the purpose of determining its effects, its allegations shall be liberally construed, with a view to substantial justice between the parties.

N. Y. Code, § 159.

1. Substantial justice spoken of in the statute is substantial legal justice, to be ascertained and determined by fixed rules and positive statutes, and not

the abstract and varying notion of equity which may be entertained by each individual. *Harris v. Brown*, 1 Cal. 98.

2. The rule requiring the pleading to be most strongly construed against the pleader does not require such a construction to be given (if it will reasonably bear a different one) as will make the pleading absurd. *Marshall v. Shafter*, 32 Cal. 176.

3. In pleading, doubtful language is construed most strongly against the pleader. *Moore v. Reese*, 30 Cal. 570.

4. The common law rule, that a pleading must be taken strongly against the pleader where the language used is ambiguous, has no application when the pleader confesses that his pleading is ambiguous, and asks to amend it. *Nevada County and Sacramento County Canal Company v. Kidd*, 28 Cal. 673.

§ 71. *No error or defect to be regarded, unless it affects the substantial rights.*

The Court shall, in every stage of an action, disregard any error or defect in the pleadings, or proceedings, which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect.

N. Y. Code, § 176.

1. The seventy-first section of the Practice Act, requiring the Courts to disregard errors not affecting substantial rights, applies to errors of description in a pleading as well as to errors in other respects. *Peters v. Ross*, 20 Cal. 586.

2. Thus, where in an action on a verbal contract, the complaint alleged several distinct promises on the part of defendants which were denied by the answer, and on the trial the plaintiff introduced no proof, except as to one of the promises: *Held*, that this was not ground for nonsuit that the provision of the Practice Act above referred to require a relaxation of the common law rule respecting a variance, and that, it being apparent the defendants were not surprised or prejudiced by the failure of proof, the error in stating the agreement should have been disregarded. *Id.*

3. A judgment will not be reversed on the ground of variance between the pleadings and proof, when the variance does not mislead the appellant to his prejudice. *Began v. O'Reilly*, 32 Cal. 11.

4. The seventy-first section of the Practice Act, requiring immaterial variances between the pleadings and proofs to be disregarded, is a most beneficial provision, and should be literally construed and carried out. *Id.*

5. In an action against a common carrier for not complying with a contract to carry or deliver a draft, the complaint alleged that it was signed "John Q. Jackson;" the proof showed that it was signed "John Q. Jackson, Agent." *Held*, that the variance was immaterial. *Zeigler v. Wells, Fargo & Co.*, 28 Cal. 263.

6. Variance between pleading and proof. If the answer sets up as a defense, in an action on a bill of exchange, a total failure of consideration, and the proof shows a partial only, the variance is not an available one under our practice. *Plato v. Vega*, 31 Cal. 383.

7. If, in the progress of a trial, evidence is offered by the plaintiff at variance with the allegations of the complaint, and the counsel for the defense does not object to it at the time, nor move to strike it out upon the ground of variance, this error is waived, and the Court may instruct the jury in relation to the whole field of inquiry covered by the evidence. *Boyes v. California Stage Co.* 25 Cal. 473.

TITLE V.

OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

CHAPTER I.—*Arrest and Bail.*

- SECTION 72.** No person to be arrested except as prescribed by this Act.
73. Cases in which defendant may be arrested.
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75. Affidavit to obtain order, what to contain.
76. Security by plaintiff before order of arrest.
77. Order, when made, and its form.
78. Affidavit and order to be delivered to the sheriff and copy to defendant.
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80. Defendant to be discharged on bail or deposit.
81. Bail, how given.
- 82, 83. Surrender of defendant.
84. Bail, how proceeded against.
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86. Delivery of undertaking to plaintiff, and its acceptance or rejection by him.
87. Notice of justification. New undertaking, if other bail.
88. Qualification of bail.
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90. Allowance of bail.
91. Deposit of money with sheriff.
92. Payment of money into Court by sheriff.
93. Substituting bail for deposit.
94. Money deposited, how applied, or disposed of.
95. Sheriff, when liable as bail, and his discharge from liability.
96. Proceedings on judgment against sheriff.
97. Motion to vacate order of arrest or reduce bail, affidavits on motion.
98. When the order vacated or bail reduced.

§ 72. *No person to be arrested except as prescribed by this Act.*

No person shall be arrested in a civil action, except as prescribed by this Act.

§ 73. *Cases in which defendant may be arrested.*

The defendant may be arrested as hereinafter prescribed, in the following cases arising after the passage of this Act:¹

(1) STATUTES OF 1880, 407; WOOD'S DIGEST, 282, ART. 1381; HYTHALL'S DIGEST, ART. 3638.

An Act for the relief of persons imprisoned on civil process. Passed April 22d, 1880.

1. Every person confined in jail on an execution or order issued on a judgment rendered in a civil action, shall be discharged therefrom upon the conditions hereinafter specified.

2. Such person shall cause a notice in writing to be given to the plaintiff, his agent or attorney, that at a certain time and place he will apply to the Judge of the District Court of

1st. In an action for the recovery of money or damages on a cause of action arising upon contract express or implied, when the defendant is about to depart from the State, with intent to defraud his creditors, or where or when the action is for willful injury to person, to character, or to property, knowing the property to belong to another :

2d. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer ; or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such ; or by any other person in a fiduciary capacity, or for misconduct or neglect in office, or in a professional employment ; or for a willful violation of duty :

3d. In an action to recover the possession of personal property, unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, so that it cannot be found, or taken by the sheriff.

4th. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation, for which the action is brought ; or in concealing, or disposing of the property, for the taking, detention, or conversion of which the action is brought :

5th. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

N. Y. Code, § 179.

the county in which his person may be confined ; or, in case of his absence or inability to act, to the Judge of the County Court of the county in which such person may be imprisoned, for the purpose of obtaining a discharge from his imprisonment. In the county of San Francisco, the application may be made to the Judge of a Superior Court of the city of San Francisco.

3. Such notice shall be served upon the plaintiff, his agent or attorney, one day at least before the hearing of the application, in cases where the plaintiff, his agent or attorney, lives within twenty miles of the place of hearing ; and one day shall be added for every additional twenty miles that such person may reside from the place of hearing.

4. At the time and place specified in the notice, such person shall be taken before such Judge, who shall examine him under oath concerning his estate, and property, and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed, and such Judge shall also hear any other legal and pertinent evidence that may be produced by the debtor or the creditor.

5. The plaintiff in the action may, upon such examination, propose to the prisoner any interrogatories pertinent to the inquiry ; and they shall, if required by him, be proposed and answered in writing ; and the answer shall be signed and sworn to by the prisoner.

6. If, upon the examination, the Judge shall be satisfied that the prisoner is entitled to his discharge, such Judge shall administer to him the following oath, to wit : " I do solemnly swear that I have not any estate, real or personal, to the amount of fifty dollars, except such as is by law exempted from being taken in execution ; and that I have not any other

1. No person can be imprisoned for debt, under the Constitution, except in cases of fraud. An assault and battery is not a case of fraud within the meaning of the Constitution. *Ex parte Prader*, 6 Cal. 239.

2. To entitle a party to the remedy of arrest, it is not necessary that he should know positively the commission of a fraud. It is sufficient, if the circumstances detailed would induce a reasonable belief that a fraud was intended. *Southworth v. Resting*, 3 Cal. 378.

3. First subdivision.—The seventy-third section of the Practice Act, which provides that "the defendant may be arrested where the notice is for willful injury to person or character," is directly in conflict with the fifteenth section of article one of the Constitution. *Id.*

4. Second subdivision—Agent, when he can be arrested.—In a suit to recover money received by a person as agent, he cannot be arrested without showing some fraudulent conduct on his part, or a demand on him by the principal, and a refusal by him to pay. An arrest without such showing is prohibited by section fifteen, article one, of the Constitution. *In the matter of Holdforth*, 1 Cal. 438.

5. A. being the owner of an invoice of goods in the city of New York, sold one-half interest therein to B., with an arrangement that the latter should proceed to San Francisco and there dispose of the same on joint account. *Held*, that this constituted a partnership between them, and that B. was not subject to arrest in an action by A. to recover a part of the proceeds of the sales. *Soule v. Hayward*, 1 Cal. 345.

6. Section seventy-four (now 73) of the Practice Act, which provides for the arrest of a debtor in certain cases, does not apply in the case of one partner suing to recover money received by another. *Id.*

7. Fourth subdivision.—In order to sustain the allegations of fraud and deceit in contracting a debt, it is necessary to prove that the representations alleged to have been fraudulent and deceitful were not true. *Belden v. Henriquez*, 8 Cal. 87.

8. A defendant cannot be arrested for fraudulent representations in obtaining money, when these representations were made some time after the money was obtained. *Snow v. Halstead*, 1 Cal. 361.

9. Complaint.—What should be alleged. See *ante*, note to sec. 39; title, "Arrest" and "Fraud."

10. Judgment.—To authorize an arrest of the defendant upon execution

estate now conveyed or concealed, or in any way disposed of, with design to secure the same to my use, or to defraud my creditors; so help me God."

7. After administering the oath, the Judge shall issue an order that the prisoner be discharged from custody, if he be imprisoned for no other cause; and the officer, upon the service of such order, shall discharge the prisoner forthwith, if he be imprisoned for no other cause.

8. If such Judge should not discharge the prisoner, he may apply for his discharge at the end of every succeeding ten days, in the same manner as above provided, and the same proceedings shall thereupon be had.

9. The prisoner, after being so discharged, shall be forever exempted from arrest or imprisonment for the same cause of action, unless he shall be convicted of having wilfully sworn falsely upon his examination before the Judge, or in taking the oath before prescribed.

10. The judgment against any prisoner, who is discharged as aforesaid, shall remain in full force against any estate which may then or at any time afterwards belong to him, and the plaintiff may take out a new execution against the goods and estate of the prisoner, in like manner as if he had never been committed.

11. The plaintiff in the action may at any time order the prisoner to be discharged, and he shall not thereafter be liable to imprisonment for the same cause of action.

12. Whenever a person is committed to jail on an execution or order issued on a judgment recovered in a civil action, the creditor, his agent or attorney, shall advance to the jailor, within twenty-four hours after such commitment, sufficient money to pay for the support of said prisoner during the time for which he may be imprisoned; and in case the money should not be so advanced, or if, during the time the prisoner may be in confinement, the money should be expended in the support of such prisoner, and the creditor should neglect, at twenty-four hours, to advance such further sum as might be necessary for his support, the jailor shall forthwith discharge such prisoner from custody; and such discharge shall have the same effect as a discharge by order of the creditor.

issued upon a judgment recovered in an action upon contract, the fraud for which the arrest is sought must be alleged in the complaint, and be passed upon by the jury, and be stated in the judgment. *Davis v. Robinson*, 10 Cal. 411.

11. In cases of fraud, it appears that there can be but two judgments—one against the person, and the other against the property; in the former of which the execution issues directing the officers to arrest and confine the party until the debt is paid. *Matoon v. Eder*, 6 Cal. 60.

12. **Execution.**—See sub. 3, § 210.

§ 74. *Order for arrest, by whom made.*

An order for the arrest of the defendant shall be obtained from a Judge of the Court in which the action is brought, or from a County Judge.

N. Y. Code, § 180.

§ 75. *Affidavit to obtain order, what to contain.*

The order may be made whenever it shall appear to the Judge by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists; and that the case is one of those mentioned in section seventy-three. The affidavit shall be either positive, or upon information and belief; and when upon information and belief, it shall state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit shall be filed with the clerk of the county.

N. Y. Code, § 181; *Bencheroff's Forms*, 448, 490; *Abb. Forms*, 1213, 1306.

1. **Affidavit.**—The affidavit to sustain an arrest must show the facts relied upon by positive averment; and it is not sufficient to refer to the complaint, or to any other paper, to show what the affidavit ought itself to disclose. *McGillvery v. Moorhead*, 2 Cal. 607. When a party is arrested and discharged he cannot be arrested again in the same action. *Id.*

2. To entitle a party to the remedy of arrest, it is not necessary that he should show positively the commission of a fraud. It is sufficient if the circumstances detailed would induce a reasonable belief that a fraud was intended. *Southworth v. Resing*, 3 Cal. 377.

3. An affidavit for arrest, which avers on information and belief that the defendant has been guilty of fraud in contracting the debt, or in endeavoring to prevent its collection, in the terms required by statute, and followed by an averment of the facts on which the belief is founded, also stated on information and belief, is sufficient. *Matoon v. Eder*, 6 Cal. 57.

4. Insufficiency of the affidavit on which the writ of arrest issues cannot be set up in defense by third parties, nor even by the defendant himself after judgment. *Id.*

5. **Order of arrest.**—The writ of arrest is only an intermediate remedy or process to secure the presence of the party until final judgment, and the facts on which it is based must be affirmatively found, and the fraud stated in the judgment, in order to authorize an arrest on final process. *Matoon v. Eder*, 6 Cal. 57.

6. As a matter of practice it is safest to award an arrest even in cases of doubt, for the defendant is protected by his bond from abuse by the process, without which process the plaintiff may be remediless. *Southworth v. Resing*, 3 Cal. 377.

7. The arrest upon affidavit is not intended to secure the presence of the defendant until final judgment. *Davis v. Robinson*, 10 Cal. 411.

§ 76. *Security to plaintiff before order of arrest.* (a) (b)

Before making the order, the Judge shall require a written undertaking on the part of the plaintiff, with sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs and charges that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least five hundred dollars. Each of the sureties shall annex to the undertaking an affidavit that he is a resident and householder, or freeholder, within the State, and worth double the sum specified in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution. The undertaking shall be filed with the Clerk of the Court.

See post, § 650; N. Y. Code, § 182; Bancroft's Forms, 491; Abb. Forms, 1306-1311.

1. The obligations of bail are assumed with reference to the law, which becomes a part of their contract, and the whole statute must be examined to determine their liability. *Magoon v. Eder*, 6 Cal. 57.

§ 77. *Order, when made, and its form.*

The order may be made to accompany the summons, or any time afterwards before judgment. It shall require the sheriff of the county where the defendant may be found

(c) CHAPTER CXXIV.—Act to exempt the city and county of San Francisco from giving undertakings in certain cases. Stat. 1861, page 380.

SECTION 1. In any suit at law, or in equity, wherein the city and county of San Francisco is a party plaintiff or defendant, no bond, written undertaking, or security shall be required of said city and county, under the provisions of sections seventy-six, one hundred and two, one hundred and fifteen, and one hundred and twenty-two, of the Act entitled an Act to regulate proceedings in civil cases in the Courts of Justice in this State, passed April 29th, 1851, commonly called the "Civil Practice Act;" and of the Acts amendatory thereof and supplementary thereto, requiring of plaintiffs security in cases of arrest, replevin, injunction and attachments; but on complying with the other provisions required by law, the said city and county of San Francisco shall have the same rights, remedies and benefits, as if the undertakings, bond or securities were given and approved, as required by law in such cases.

(b) Approved March 28, 1864, 1863-4, 261.

SECTION 1. In any suit at law or in equity, or in any civil proceeding whatever wherein the State or the people of the State is a party plaintiff, or any State officer, in his official capacity or on behalf of the State, is a party plaintiff or defendant, no bond, written undertaking, or security shall be required of the State or the people thereof, or any officer acting as aforesaid, under the provisions of sections seventy-six, one hundred and two, one hundred and fifteen, and one hundred and twenty-two, or any other section of the Act entitled an Act to regulate proceedings in civil cases in the Courts of Justice in this State, passed April 29th, A. D. eighteen hundred and fifty-one, or of the Acts amendatory thereof and supplementary thereto, requiring parties to give security in cases of arrest, replevin, injunction, and attachment, and in other cases; but on complying with the other provisions required by law, the State, or the people thereof, or any State officer acting as aforesaid, shall have the same rights, remedies and benefits as if the bond, undertaking, or security were given and approved as required by law.

forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned to the Clerk of the Court in which the action is pending.

N. Y. Code, § 183; Bancroft's Forms, No. 442; Abb. Forms, 1312.

§ 78. *Affidavit and order to be delivered to the sheriff and copy to defendant.*

The order of arrest, with a copy of the affidavit upon which it is made, shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver to him the copy of the affidavit; and also, if desired, a copy of the order of arrest.

N. Y. Code, § 184. The sheriff must file them within ten days; Rule XXXIX. San Francisco.

§ 79. *Arrest, how made.*

The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law.

N. Y. Code, § 185.

§ 80. *Defendant to be discharged on bail or deposit.*

The defendant, at any time before execution, shall be discharged from the arrest either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

N. Y. Code, § 186.

§ 81. *Bail, how given.*

The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, stating their places of residence and occupations, to the effect that they are bound in the amount mentioned in the order of arrest; that the defendant shall at all times render himself amenable to the process of the Court, during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

N. Y. Code, § 187; Bancroft's Forms, 493; Abb. F. 1338-1340.

§ 82. *Surrender of defendant.*

At any time before judgment, or within ten days there-

after, the bail may surrender the defendant in their exoneration: or he may surrender himself to the sheriff of the county where he was arrested.

N. Y. Code, § 188.

1. The sureties on the bail bond of a defendant, arrested in a civil action, are not bound to surrender the defendant within ten days after judgment against him, unless the plaintiff takes such measures as would authorize the officer to hold defendant in custody. *Allen v. Breslaue*, 8 Cal. 552.

2. A surrender, within ten days after execution, is a sufficient compliance with the statute. *Id.*

3. Where a party offered to surrender himself in discharge of his sureties: *Held*, to be a good surrender, and a discharge of the sureties from all liability. *Bobb v. Oakley*, 5 Cal. 93.

4. Where the judgment is not such as will warrant a writ of *ca. sa.* to be issued under it, the bail will not be charged for neglecting to surrender the judgment debtor. *Mattoon v. Eder*, 6 Cal. 57.

§ 83. *Surrender of defendant.*

For the purpose of surrendering the defendant, the bail at any time or place before they are finally charged, may themselves arrest him; or by a written authority, endorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of the defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail shall be exonerated: *provided*, such arrest, delivery, or surrender, take place before the expiration of ten days after judgment; but if such arrest, delivery, or surrender, be not made within ten days after judgment, the bail shall be finally charged on their undertaking, and be bound to pay the amount of the judgment, within ten days thereafter.

N. Y. Code, § 189; §§ 83 and 84 discussed.

§ 84. *Bail, how proceeded against.*

If the bail neglect or refuse to pay the judgment within ten days after they are finally charged, an action may be commenced against such bail for the amount of such original judgment.

¹Amended 1854, 86.

N. Y. Code, § 190; §§ 83 and 84 discussed; *Mattoon v. Eder*, 6 Cal. 57.

85. *Bail, how exonerated.*

The bill shall also be exonerated by the death of the defendant of his imprisonment in a State prison; or by his

legal discharge from the obligation to render himself amenable to the process.

N. Y. Code, § 191.

§ 86. *Delivery of undertaking to plaintiff, and its acceptance or rejection by him.*

Within the time limited for that purpose, the sheriff shall file the order of arrest in the office of the clerk of the Court in which the action is pending, with his return endorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he shall retain in his possession until filed, as herein provided. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted them, and the sheriff shall be exonerated from liability. If no notice be served within ten days, the original undertaking shall be filed with the clerk of the Court.

N. Y. Code, § 192.

§ 87. *Notice of justification. New undertaking, if other bail.*

Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail, (specifying the places of residence and occupations of the latter,) before a Judge of the Court, or County Judge, or County Clerk, at a specified time and place; the time to be not less than five, nor more than ten days thereafter, except by consent of parties. In case other bail be given, there shall be a new undertaking.

N. Y. Code, § 193.

§ 88. *Qualification of bail.*

The qualifications of bail shall be as follows:

1st. Each of them shall be a resident and householder, or freeholder, within the county;

2d. Each shall be worth the amount specified in the order of arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the Judge, or County Clerk, on justification, may allow more than two sureties to justify severally, in amounts less than

that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

N. Y. Code, § 194. See *post*, § 650.

§ 89. *Justification and allowance of bail.*

For the purpose of justification, each of the bail shall attend before the Judge, or County Clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the Judge or County Clerk, in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

N. Y. Code, § 195.

§ 90. *Justification and allowance of bail.*

If the Judge, or Clerk, find the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the sheriff shall thereupon be exonerated from liability.

N. Y. Code, § 196.

§ 91. *Deposit of money with sheriff.*

The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of the bail be reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case, the sheriff shall give the defendant a certificate of the deposit made, and the defendant shall be discharged out of custody.

N. Y. Code, § 197.

§ 92. *Payment of money into Court by sheriff.*

The sheriff shall immediately after the deposit pay the same into Court, and take from the clerk receiving the same, two certificates of such payment; the one of which he shall deliver or transmit to the plaintiff, or his attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.

N. Y. Code, § 198.

§ 93. *Substituting bail for deposit.*

If money be deposited, as provided in the last two sections, bail may be given, and may justify upon notice, at any time before judgment; and on the filing of the undertaking and justification with the Clerk, the money deposited shall be refunded by such Clerk to the defendant.

N. Y. Code, § 199.

§ 94. *Money deposited, how applied or disposed of.*

Where money shall have been deposited, if it remain on deposit at the time of the recovery of a judgment in favor of the plaintiff, the Clerk shall, under the direction of the Court, apply the same in satisfaction thereof; and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the Clerk shall, under like direction of the Court, refund to him the whole sum deposited and remaining unapplied.

N. Y. Code, § 200.

§ 95. *Sheriff, when liable as bail, and his discharge from liability.*

If, after being arrested, the defendant escape or be rescued, the sheriff shall himself be liable as bail; but he may discharge himself from such liability, by the giving and justification of bail, at any time before judgment.

N. Y. Code, § 201.

§ 96. *Proceedings on judgment against sheriff.*

If a judgment be recovered against the Sheriff, upon his liability as bail, and an execution thereon be returned unsatisfied in whole or in part, the same proceedings may be had on his official bond, for the recovery of the whole or any deficiency, as in other cases of delinquency.

N. Y. Code, § 202.

§ 97. *Motion to vacate order of arrest, or reduce bail and affidavits on motion.*

A defendant arrested may at any time before the justification of bail apply to the Judge who made the order, or the Court in which the action is pending, upon reasonable notice

to the plaintiff to vacate the order of arrest, or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.

N. Y. Code, §§ 204, 205; Abb. Forms, 1322, 1327.

1. Where a party is once arrested and discharged, he cannot be arrested again in the same action. *McGilvery v. Moorhead*, 2 Cal. 607.

2. A party will be discharged from arrest where the process, though proper in form, has been issued in an improper case. *Soule v. Hayward*, 1 Cal. 345.

3. On a rule to show cause why the arrest of a party, ordered by the Court on an allegation of fraud, should not be vacated, the question of fact involved in it must be decided like any other fact, by the weight of evidence. *Southworth v. Resing*, 3 Cal. 378.

4. The defendant on arrest, by putting in bail and neglecting to move to be discharged, consents to process and waives all previous irregularities. *Mattoon v. Eder*, 6 Cal. 57.

§ 98. *When the order vacated or bail reduced.*

If upon such application it shall satisfactorily appear that there was not sufficient cause for the arrest, the order shall be vacated; or if it satisfactorily appear that the bail was fixed too high, the amount shall be reduced.

[No decision in relation to "arrests" has been rendered by the Supreme Court later than that of *Davis v. Robinson*, in 10 Cal. 411.]

Abb. Forms, 1, 327.

TITLE VI.

CHAPTER II.—*Claim and delivery of personal property.*

SECTION 99. Delivery of personal property, when it may be claimed.

100. Affidavit and its requisites.

101. Requisition to sheriff to take and deliver the property.

102. Security on the part of the plaintiff and justification.

103. Exception to sureties and proceedings thereon, or on failure to except.

104. Defendant, when entitled to redelivery.

105. Justification of defendant's sureties.

106. Qualification and justification of sureties.

107. Property, how taken, when concealed in building or inclosure.

108. Property, how kept.

109. Claim of property by third person.

110. Notice and affidavit, when and where to be filed.

§ 99. *Delivery of personal property, when it may be claimed.*

The plaintiff, in an action to recover the possession of

personal property, may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him, as provided in this chapter.

N. Y. Code, § 206; Bancroft's Forms, 528; Abb. Forms, 613-619.

1. **Complaint.**—See *ante*, § 39, No. 288-290.

2. **Answer.**—See *ante*, § 46, Nos. 45, 46, 54, 55, 60, 61, 68, 85, 101, 124, 127, 303.

3. **Action for claim and delivery of personal property.**—The action for the "claim and delivery of personal property," under our practice, is at least commensurate with the action of detinue at common law. *McLaughlin v. Platti*, 27 Cal. 464.

4. **Inducement, what is.**—In the action of detinue, the manner of laying the possession of the property has always been held to be inducement. It is usual to aver a bailment or finding. *Otero v. Bullard*, 3 Cal. 188.

5. **Fixtures, when personal property.**—By the wrongful severance from the premises, the fixtures become personal property for the recovery of which an action of replevin will lie by the purchaser after he obtains the sheriff's deed. *Sands v. Pfeiffer*, 10 Cal. 258.

6. **Bill in equity will lie to recover personal property.**—Where the recovery of the property is the primary object of the suit, as in some cases where damages will not compensate plaintiff, he should frame his bill in equity, specifying the reasons therefor, and then a decree can be made to compel specific delivery. *Nickerson v. Chatterton*, 7 Cal. 570.

7. **Object of suit in replevin.**—The primary object of the replevin suit is the recovery of the thing itself. The value is received only in the alternative that the property is not returned. *Hunt v. Robinson*, 11 Cal. 277.

8. **Jury, waived when.**—The failure of the defendant to appear on the trial of an action of replevin, when the cause is called, is a waiver of a jury under the one hundred and seventy-ninth section of the Code. *Waltham v. Carson*, 10 Cal. 180.

9. **Action, when can be maintained.**—In trover, the plaintiff must either have the possession or the immediate right to the possession of the property, to entitle him to recover. *Middleworth v. Sedgwick*, 10 Cal. 392.

10. A safe in the possession of McC. belonging to W., F. & Co., for whom, as also for plaintiff, he was agent, contained \$6,000 in coin. Of this sum four hundred dollars belonged to W., F. & Co., the balance to plaintiff. Defendant, as sheriff, under a writ against McC., seized \$1,800 of the money in the safe as his property, and put it in a bag. Plaintiff then claimed the money as his, McC. being present and not objecting. Held, that this amounted to a segregation of the \$1,800 from the mass of coin in the safe, so as to sustain replevin by plaintiff. *Griffith v. Bogardus*, 14 Cal. 410.

11. To render the defendant liable to the action, he must have converted the property to his own use; and if not, then any other act, to amount to a conversion, must be done with a wrongful intent, either express or implied. *Rogers v. Huie*, 2 Cal. 571.

12. Replevin lies for all goods and chattels unlawfully taken or detained, and may be brought whenever one person claims personal property in the possession of another, and this whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right to the possession. *Lazard v. Wheeler*, 22 Cal. 139.

13. Where the defendant is in the adverse possession of land as a trespasser, without color of title, he is not in the position before the Statute of Limitations has run to contest the title of the true owner in such a sense as to defeat a personal action brought by the true owner to recover wood cut by him on the land. *Kimball v. Lohmas*, 31 Cal. 156; *Halleck v. Mixer*, 16 Cal. 579; *Page v. Fowler*, Oct. T. 1867.

14. The true owner of land may maintain replevin to recover wood cut on the land by one in possession of the same without color of title. *Id.*

15. *Query*: Is not the owner of land entitled to recover possession of wood cut on the same by one in possession thereof in good faith under color of title. *Id.*

16. The common law rule in relation to the right of the owner of land to recover possession of cord cut wood on the land by one in possession, without color of title, commented on. *Id.*

17. A mere agreement between two or more persons to convert the property of another, without an actual intermeddling with it, does not give the owner a cause of action against the parties to the agreement. *Herron v. Hughes et als*, 25 Cal. 259.

18. A bill of sale of a given number of cattle—part of a herd running on the seller's ranch—giving the purchaser the right to select the number sold, and take the same immediately, gives to the purchaser the right, after demand and refusal, to recover possession of the entire herd in an action at law, and then select the number purchased, and return the residue to the seller. *McLaughlin v. Piatti*, 27 Cal. 464.

19. *Action, when it cannot be maintained.*—One partner cannot sustain an action against his copartner for the delivery of personal property belonging to the partnership. *Buckley v. Carlisle*, 2 Cal. 420.

20. If an officer, by his misconduct, induces a sale of property for less than it would otherwise have brought, the remedy must be an action for damages resulting from his acts, and not an action to recover the property or its value. *Foster v. Colonel*, Oct. T. 1867.

21. Replevin for hay cut on public lands cannot be maintained by a prior possessor against one who was in adverse possession, claiming a preemption right entered when he cut the hay. *Page v. Fowler*, 28 Cal. 605; affirmed in *Page v. Fowler*, Oct. T. 1867.

22. *When demand is, or not, necessary.*—It is a general rule that, when the possession of property is originally acquired by a tort, no demand previous to the institution of suit for its recovery is necessary. It is only when the original possession is lawful, and the action relies upon the unlawful detention, that a demand is required. *Paige v. O'Neal*, 12 Cal. 483.

23. Where the original taking of personal property is tortious, no demand is necessary. *Ledley v. Hays*, 1 Cal. 160.

24. Where the taking is by an officer upon proper legal authority, a demand is necessary in order to make him liable in damages. *Doumie v. Gorham*, 6 Cal. 43; *Taylor v. Seymour*, *Id.* 512; *Killey v. Scannell*, 12 *Id.* 73.

25. Certain personal property owned by plaintiff, but which had been used by A. & G., under a contract of hire, was seized by the sheriff from the possession of the plaintiff, by virtue of an attachment against G., subsequent to which plaintiff, having made a demand for the property upon the sheriff, but not upon A. & G., commenced this action against the former for its recovery: *Held*, that the demand, if necessary at all, was properly made upon the defendant in whose possession the property was at the time. *Woodworth v. Knowlton*, 22 Cal. 164.

26. If the original possession of property is acquired by a tort, no demand previous to the institution of a suit is necessary. *Sargent v. Sturm*, 23 Cal. 359.

27. If the tortfeasor has parted with the possession of the goods tortiously obtained, in payment of a pre-existing debt, or if they have been sold on an execution against him, and bid in by a creditor, no demand of the purchaser is necessary before the institution of a suit, nor can the purchaser, who has obtained them in such manner, hold them against the original vendor. *Id.*

28. If a sheriff seizes the property of A., then in A.'s possession, as the property of B., under an execution against the property of B., a demand of the return of the property by A. is not necessary before bringing suit for damages. *Moore v. Murdock*, 26, 524.

29. If a sheriff, by virtue of an execution, seizes the property of a person other than the judgment debtor, whether by mistake or design, it is not neces-

sary for the owner of the property thus seized to make a demand on the sheriff before commencing suit. *Bouhuare v. Creddock*, 30 Cal. 190.

30. **Evidence.**—Where the vendee replevied the goods from the attaching creditor, and only established title by proving a possession of several months, it was competent for the defendant in replevin, on cross-examination of plaintiff's witness, to ask in whose possession the chattels were at a certain period anterior to the possession proved by plaintiff, in order to draw from him, if possible, the fact that plaintiff's possession was a fraud to hide the debtor's property. *Thornburgh v. Hand*, 7 Cal. 554.

31. The declarations of a vendor of personal property, after the sale, not good to impeach the title of the vendee. *Visher v. Webster*, 8 Cal. 109.

32. Where, in an action to recover specific personal property, plaintiff relied exclusively upon his possession at the time of the taking by defendant; and defendant having first established a *prima facie* title sufficient to destroy the presumption of title in plaintiff arising from his possession, then went further, and showed—plaintiff excepting—that plaintiff obtained the property by proceedings under a void judgment: *Held*, that the introduction of this further evidence by defendant, showing the invalidity of the judgment, was of no advantage to him—as he had already rebutted plaintiff's case based solely on possession—and hence that it did not prejudice plaintiff, and is no ground of error. *Lafontaine v. Greene*, 17 Cal. 294.

33. **Damages.**—In actions for taking and detaining personal property, no circumstances of aggravation being shown, the measure of damage is the value of the property, with interest. *Dorsey v. Manlove*, 14 Cal. 553.

34. In an action against a sheriff for wrongfully seizing and selling property, under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure, the measure of damages is the value of the property at the time it was seized, and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict. *Phelps v. Owens*, 11 Cal. 22.

35. The rule is, that when property converted has a fixed value, the measure of damages is that value, with legal interest from the time of its conversion; when the value is fluctuating, the plaintiff may recover the highest value at the time of its conversion, or at any time afterwards. *Douglass v. Krapf*, 9 Cal. 563; *Dorsey v. Manlove*, 14 Cal. 555.

36. In an action for the unlawful taking and conversion of a lot of hay: *Held*, that when the property converted has a fixed value, the measure of damages is that value, with legal interest from the time of the conversion; when the value is fluctuating, the plaintiff may recover the highest market value at the time of the conversion, or at any time afterwards. The market value is to be ascertained at the place of the conversion. Interest is to be allowed, as a matter of legal right, from the time when the value is estimated. *Hamer v. Hathaway*, July T. 1866.

37. In an action against a sheriff for damages for the unlawful seizure of goods, the true measure of damages is, the value of the goods at the time of the taking. *Pelberg v. Gorham*, 23 Cal. 349.

See further, sec. 200, *post*, damages; also, § 39, No. 138. [May recover the value in Legal Tender notes.]

38. **Verdict, form of.**—See § 177, *post*.

39. **Judgment.**—In an action to recover the possession of personal property, with damages for its detention, the judgment may be for more than the value as alleged in the complaint, if it be within the *ad damnum* of the writ. The value of the property is only one predicate of the recovery. *Coghill v. Boring*, 15 Cal. 213.

40. In an action of replevin, where the defendant has required the return of the property, and given an undertaking for such purpose, a judgment for plaintiff, in order to hold the sureties on the undertaking, must be in the alternative, as required by sections one hundred and four, one hundred and seventy-seven, and two hundred and ten of the Practice Act. *Nickerson v. Chatterton*, 7 Cal. 568; *Dorsey v. Manlove*, 14 Cal. 555.

41. A defendant in replevin who recovers judgment, the jury failing to find the value of the property to exceed two hundred dollars, is, nevertheless, entitled to his costs, where the plaintiff's complaint states its value at a sum exceeding that amount. *Edgar v. Gray*, 5 Cal. 267.

42. If an action of replevin be improperly commenced, the party bringing it, having obtained the benefit, cannot avoid the undertaking he has given by pleading his own misfeasance. *Turner v. Billagram*, 2 Cal. 522.

43. In an action to recover possession of personal property, if the plaintiff takes the property at the commencement of the action, and the defendant prays a return of it, and the defendant was entitled to the property at the commencement of the action, but his right has ceased and vested in the plaintiff before trial, the judgment should leave the property in plaintiff's possession, but award costs to defendant. *O'Connor v. Blake*, 29 Cal. 312.

44. In an action by the pledgee against a stranger for the conversion of goods, the plaintiff is entitled to recover the full value of the goods; but if the goods be converted by the owner, or by any one acting in privity with him, the pledgee can recover only the value of his special interest in the pledge. *Treadwell v. Davis*, April T. 1868.

45. Judgment, how entered.—See § 200, *post*.

§ 100. *Affidavit and its requisites.*

Where a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing :

1st. That the plaintiff is the owner of the property claimed, (particularly describing it,) or is lawfully entitled to the possession thereof :

2d. That the property is wrongfully detained by the defendant :

3d. The alleged cause of the detention thereof, according to his best knowledge, information, and belief :

4th. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute ; or seized under an execution, or an attachment against the property of the plaintiff ; or if so seized, that it is by statute exempt from such seizure ; and,

5th. The actual value of the property.

N. Y. Code, § 207 ; Bancroft's Forms, 600 ; Abb. Forms, 1462-1469.

§ 101. *'Requisition to sheriff to take and deliver the property.*

The plaintiff or his attorney may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant.

¹Amended 1854, 86. N. Y. Code, § 208. Abb. Forms, 1470-1471.

1. The sheriff will, however, be liable to the owner, who has his legal remedy against any one for the taking, unless it be by virtue of legal process against him. *Rhodes v. Patterson*, 3 Cal. 469.

§ 102. *'Security on the part of the plaintiff and justification.*

Upon a receipt of the affidavit, and notice with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendants, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the sheriff shall forthwith take the property, described in the affidavit, if it be in possession of the defendant or his agent, and retain it in his custody. He shall also without delay serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally if he can be found, or to his agent, from whose possession the property is taken, or if neither can be found by leaving them at the usual place of abode of either, with some person of suitable age and discretion, or if neither have any known place of abode, by putting them in the nearest postoffice, directed to the defendant.

¹Amended 1854, 86. N. Y. Code, § 209. State, cities, etc., not required to give bonds.

1. In an action on the bond, the fact that defendant brought his action before an incompetent tribunal is no defense, and the plea that the title of property so replevied is in him, is bad. *McDermott v. Isbell*, 4 Cal. 113.

2. Where the defendant, in a replevin suit, failed to claim the return of the property in his answer, and on the trial the jury found a verdict for the defendant, on which the Court rendered judgment against plaintiffs for costs, which was paid: *Held*, that the payment of the judgment, as taken, was a complete discharge of plaintiffs' sureties on the undertaking. *Chambers v. Waters*, 7 Cal. 390.

3. Where a replevin bond substantially conforms to the act, and no variation is pointed out, the assignee of the defendants can maintain an action upon it. *Wingate v. Brooks*, 3 Cal. 112.

4. No recovery can be had on a bond purporting to be a joint bond of the principal and sureties, but signed by the latter only. *City of Sacramento v. Dunlap*, 14 Cal. 421.

5. Otherwise, as to undertakings under our system. They are original and independent contracts on the part of the sureties, and do not require the signature of the principal. *Id.*

6. Where the plaintiff, in replevin, gives the statutory undertaking, and takes possession of the property in suit, and is afterwards nonsuited, and judgment entered against him for the return of the property and for costs: *Held*, that his sureties are liable for damages sustained by defendant by reason of a failure to return the goods; but not for damages for the original taking and detention—the value of the goods not having been found by the jury. *Ginaca v. Ahwood*, 8 Cal. 446.

7. T. commenced suit against J. by attachment; the writ was levied upon certain personal property by the plaintiff. H., as sheriff. M. J., wife of J., claimed the property as sole trader, and brought her action of replevin for the property

and obtained possession of the same by the delivery of an undertaking, as required by section one hundred and two of the Code. The undertaking was executed by defendants R. and S. The replevin suit was decided February 5th, 1855, in favor of H. T. obtained judgment in the attachment suit against J. November 30th, 1854. On the 18th of February, 1855, execution in favor of other creditors of J. coming into the hands of H., as sheriff, he levied them on the same property, and subsequently sold the property and paid the proceeds into Court. H. then brought this suit against the sureties in the replevin bond. *Held*, that the lien of T.'s attachment continued after the replevy of the goods by M. J. *Hunt v. Robinson*, 11 Cal. 262.

8. The possession obtained by the plaintiff in replevin is only temporary. It does not divest the title, or discharge the lien. *Id.*

9. In an action upon a replevin bond, the defendant's liability is limited to the damage sustained by a failure to return the property. *Id.*

10. When the same property came into the hands of H. as sheriff, the condition of the replevin bond, to return the property, was fulfilled. *Id.*

11. Where the replevin action is dismissed before trial, the liability of the sureties on the undertaking for a return of the property is not affected by the fact, that before the dismissal an answer had been filed in which no return of the property was claimed. *Mills v. Gleason*, 21 Cal. 274.

12. The dismissal of a replevin action by the plaintiff before trial leaves the parties to settle in an action upon the undertaking those matters, including the right of defendant to a return of the property, which, had the original suit been prosecuted, must have been determined therein in the first instance. The opportunity to obtain a judgment for the return having been taken away by the failure to prosecute, defendant is entitled to recover, in an action on the undertaking, compensation in damages. *Id.*

13. Complaint.—See *ante*, § 39, No. 336, 14. State, counties, etc., not required to give bonds. See *ante*, § 76.

§ 103. *Exception to sureties and proceedings thereon, or on failure to accept.*

The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice in like manner as upon bail on arrest; and the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

N. Y. Code, § 210.

§ 104. *Defendant, when entitled to redelivery.*

At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more

sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section one hundred and nine.

N. Y. Code, § 211; Bancroft's Forms, 602; Abb. F., 1474-1475.

1. This bond is assignable by the sheriff. *Wingate v. Brooks*, 3 Cal. 112.

2. In an action on this bond, it must be alleged that the defendant neither redelivered the property, nor paid the value thereof, as recited in the judgment. *Nickerson v. Chatterton*, 7 Cal. 568; *Chambers v. Waters*, *Id.* 390.

3. In an action on a replevin bond, the defendant's liability is limited to the damages sustained by a failure to return the property. *Hunt v. Robinson*, 11 Cal. 262.

4. The sureties only bind themselves to make good any judgment that plaintiff may lawfully obtain against defendant. *Nickerson v. Chatterton*, 7 Cal. 568.

5. The liability of the sureties cannot be more than the value of the property fixed by the judgment in the original suit. *Nickerson v. Chatterton*, 7 Cal. 568.

6. In an action against the sureties on replevin bond, it is necessary to allege and prove that the property was delivered to the party requiring it, and for whom the bond was given. *Id.* 570.

7. A replevin bond was made to the sheriff instead of the party to be protected by it, by mistake, and then corrected; this did not invalidate the bond. *Turner v. Billagrand*, 2 Cal. 522.

§ 105. *Justification of defendant's sureties.*

The defendant's sureties, upon notice to the plaintiff of not less than two or more than five days, shall justify before a Judge or County Clerk, in the same manner as upon bail on arrest; and upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until the justification is completed or expressly waived, and may retain the property until that time; if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff. See post, § 650.

N. Y. Code, § 202; Abb. Forms, 1,482.

§ 106. *Qualification and justification of sureties.*

The qualification of sureties and their justification shall be such as are prescribed by this Act, in respect to bail upon an order of arrest.

Y. Code, § 213.

§ 107. *Property, how taken when concealed in building or inclosure.*

If the property, or any part thereof, be concealed in a building or inclosure, the sheriff shall publicly demand its delivery; if it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and if necessary, he may call to his aid the power of his county.

N. Y. Code, § 214.

§ 108. *Property, how kept.*

When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

N. Y. Code, § 215.

§ 109. *Claim of property by third person.*

If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to (the) possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim, by an undertaking, by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders, or householders in the county; and no claim to such property by any other person than the defendant or his agent, shall be valid against the sheriff, unless so made.

N. Y. Code, § 216; Abb. Forms, 1,477-1,482.

1. If in a bond to indemnify a sheriff for replevyng property claimed by a person other than defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments, and executions that shall come or be brought against him, the sheriff cannot maintain an action on the bond because a judgment has been recovered against him, but must first pay the judgment. *Lott v. Mitchell*.

§ 110. *'Notice and affidavit, when and where to be filed.*

The sheriff shall file the notice, undertaking, and affidavit with his proceedings thereon, with the Clerk of the Court in which the action is pending, within twenty days after taking the property mentioned therein.

¹Amended 1854, 87. N. Y. Code, § 217.

TITLE VII.

CHAPTER III.—*Injunction.*

- SECTION 111. Injunction, what is and who may grant it.
112. When it may be granted.
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§ 111. *Injunction, what is and who may grant it.*

An injunction is a writ or order, requiring a person to refrain from a particular act. The order or writ, may be granted by the Court in which the action is brought, or by a Judge thereof, or by a County Judge; and when made by a Judge, may be enforced as the order of the Court.

N. Y. Code, § 218; Bancroft's Forms, 361-567; Abb. Forms, 1398-1499, and 1779-1782.

1. *Writ, form of.*—No particular form is necessary for a writ of injunction. The substantial thing is an authentic notification to the defendants of the mandate of the Judge, which they must then, at their peril, obey. *Summers v. Furish*, 10 Cal. 347.

2. *Injunction, county judge may grant.*—There is no prohibition in the Constitution to this grant of authority to the County Judge, and the implication is decidedly in favor of its exercise. *Thompson v. Williams*, 6 Cal. 88.

3. The grant of authority to the County Judge, to award injunctions in cases brought in the District Court, is a mere power to issue mesne process auxiliary to the proper jurisdiction of the District Court, and is not trenching upon it. *Id.*

4. The granting an injunction by a County Judge on a bill filed in the District Court is auxiliary to the action of that Court, and has the same force and effect, for all intents and purposes, as if it were the direct act of the latter. *Crandall v. Woods*, 6 Cal. 449. See *Ward v. Preston*, 23 Cal. 46; *People v. Wright*, 21 Cal. 151.

5. A County Judge, in granting an injunction upon a bill filed in the District Court, acts as an injunction master, and is exercising a power auxiliary to the jurisdiction of the District Court. The effect of such an order is the same as if made by the District Court, and the injunction is subject to be controlled, modified or dissolved by the District Judge, the same as if issued by his order in the first instance. *Borland v. Thornton*, 12 Cal. 410.

6. County judge may dissolve or modify, when.—The County Judge who grants an injunction, may dissolve or modify the same upon a proper application. *Oreanor v. Nelson*, 23 Cal. 454.

7. When courts cannot issue injunctions.—One District Court cannot, by injunction, restrain the execution of the orders or decrees of another Court of co-ordinate jurisdiction. *Rickett v. Johnson*, 8 Cal. 34; *Revalk v. Kraemer*, 8 Id. 66; *Chipman v. Hibbard*, 8 Id. 268; *Phelan v. Smith*, Id. 520.

8. District Courts have no power to restrain the execution of the judgments or orders of Courts of co-ordinate jurisdiction. *Gorham v. Toomey*, 9 Cal. 77.

9. All proceedings to enjoin judgments must issue from the Court having the control of such judgments. *Id.*

10. Courts have no power to interfere with the judgments and decrees of other Courts of concurrent jurisdiction. *Anthony v. Dunlap*, 8 Cal. 26.

11. The only case in which it will be allowed is where the Court in which the action is pending is unable, by reason of its jurisdiction, to afford the relief sought. *Id.*

12. The only exception to the rule is where the Court in which the action or proceeding is pending is unable, by reason of its jurisdiction, to afford the relief sought. Where several fraudulent judgments are confessed in several Courts, it would not be necessary for a creditor to bring a different suit in each different Court. *Uhlfelder v. Levy*, 9 Cal. 607.

13. So, where the provisions of the Code require the action to be tried in a particular county, there would be an exception, as the positive provision of the statute must be carried out. *Id.*

14. The Supreme Court has no power to grant an injunction pending an appeal. *Hicks v. Michael*, 15 Cal. 107.

15. A State Court cannot enjoin the proceedings of a Federal Court. *Phelan v. Smith*, 8 Cal. 520.

16. Generally.—There is no occasion that the plaintiff should first establish his title at law before he can obtain the injunction, when the averment of his right in the complaint is admitted by demurrer. *Tuohumne Water Co. v. Chapman*, 8 Cal. 392.

17. Query: whether a tax-payer can interfere by injunction to restrain the performance of a ministerial duty cast upon public officers by law, merely upon the ground that the effect, at some future time, if certain other things be done, might be to subject his property to taxation? *Pattison v. Board of Supervisors of Yuba County*, 13 Cal. 175.

18. Whether equity will enforce the specific performance of a contract depends not upon the character of the property involved, as whether it be real or personal, but upon the inadequate remedy afforded by a recovery of damages in an action at law. *Duff v. Fisher*, 15 Cal. 375.

19. To authorize the interposition of a Court of Chancery to enjoin a judgment at law, on the ground of newly discovered facts, the proceeding must be taken by the defendant in the judgment at law. *Mulford v. Cohn*, 18 Cal. 42.

20. An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of Court through malice, and without probable cause. *Robinson v. Kellum*, 6 Cal. 399.

21. If the act complained of is destitute of these elements, the remedy of the injured party is on the injunction bond. *Id.*

§ 112. *When it may be granted.*

An injunction may be granted in the following cases :

1st. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually :

2d. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce great or irreparable injury to the plaintiff:

3d. When it shall appear during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

N. Y. Code, § 219; Abb. Forms, 651-658; Complaint, see *ante*, § 39, note No. 241-264.

1. **First subdivision—Injunction, when it will be granted.**—Where one has an outstanding deed which improperly clouds the title of the true owner, on the application of the latter, chancery will order such deed to be canceled and annulled. *Shattuck v. Carson*, 2 Cal. 589.

2. So chancery, on like application, will interfere and prevent a sale, and the consequent execution of an improper deed. *Id.*

3. Where the petition set forth a lease and contract to pay in kind, a refusal to pay rent, and an allegation of removing the crop with intent to defraud the plaintiff of his rent, and a prayer for an injunction: *Held*, that the injunction could not issue, unless plaintiff averred the insolvency of defendant, and an inability to make the rent on attachment or execution. *Gregory v. Hay*, 3 Cal. 334.

4. A sheriff may be enjoined from selling real property belonging to the wife, under an execution against the husband. *Alverson v. Jones and Bogardus*, 10 Cal. 9.

5. Such a sale would be a cloud upon the wife's title to the property, as the deed of the sheriff would convey to the purchaser a *prima facie* title, which she would have to overcome by proof. *Id.*

6. That portion of an act prescribing that no injunction shall be issued against the commissioners appointed for the sale of the State interest within the water line, is invalid. *Guy v. Hermance*, 5 Cal. 73; *Stone v. Elkins*, 24 *Id.* 127.

7. A Court of equity will take jurisdiction of a bill for an injunction, filed by attaching creditors of an insolvent, to restrain proceedings on execution against the property attached under a judgment against the debtor, in favor of another, alleged to have been obtained by fraud, where all the material allegations of the bill, except fraud, are admitted. *Heyneman v. Darnenbery*, 6 Cal. 376.

8. It would be requiring the creditors to do a vain act to compel them to await their judgment at law and a return of execution, when it is admitted that the only effect would be a return of *nulla bona*, and the property attached would, in the mean time, have passed to innocent purchasers on execution sale under the judgment. *Id.*

9. A ferry owner, prevented from obtaining a renewal of his license, either by the incompetency or refusal of the supervisors to act in the premises, has a right to an injunction to restrain another party from running a ferry under

an illegal license granted by the County Judge, within a mile of the first established ferry. *Chard v. Stone*, 7 Cal. 117.

10. Where husband and wife execute a conveyance of their homestead, which the husband delivers to the purchaser before the purchase money therefor is paid, which is afterward fraudulently attached, in a suit brought by the real though not ostensible purchaser, against the husband alone: *Held*, that equity will compel a cancellation of the deed so obtained. *Still v. Saunders*, 8 Cal. 261.

11. A complaint alleging that plaintiffs had, for a long time, conveyed water from a stream, for mining purposes, by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in the peaceable possession thereof when defendants wrongfully diverted the same, and deprived plaintiffs thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction. *Tuolumne Water Co. v. Chapman*, 8 Cal. 322.

12. No equitable remedy can be had for a mere past diversion of a water-course; but when the injury is continuing, relief may appropriately be sought in equity. *Id.*

13. When a party has given a promissory note, and the payee assigns the note, without recourse, after maturity, and suit is brought upon the note by the assignee, the maker then files his bill against the assignor and assignee, alleging fraud in obtaining the note, and praying for an injunction, and that the note be canceled: *Held*, that the case was a proper one for equitable relief, and the maker had the right to have the note canceled, so as to prevent future litigation. *Domingo v. Getman*, 9 Cal. 97.

14. The right of a party to enjoin a sale of his property for another's debt is not denied, and is supported by several decisions of the Supreme Court. *Hickman v. O'Neal*, 10 Cal. 294; *Ford v. Rigby*, *Id.* 449.

15. The right of homestead having once attached, and not having been alienated, a deed from the sheriff, under an execution against the husband, would be a cloud upon the title, and prevent the free alienation of the property by the husband and wife. *Dunn v. Toser*, 1 Cal. 347.

16. A leased furniture to B.; during the lease, F. bought the furniture of A., B. remaining in possession and acknowledging F.'s title. J., sheriff, having an execution in favor of B. and against A., levied on the furniture as the property of A. F. thereupon filed his bill to enjoin the sale. *Held*, that the remedy by injunction is proper, as it is the only speedy, adequate and unembarrassed remedy the lessor has to vindicate his rights. *Ford v. Rigby and Irwin*, 10 Cal. 449.

17. The jurisdiction of a Court to enjoin a sale of real estate is co-extensive with its jurisdiction to set aside, and order to be canceled, a deed of such property. It is not necessary for its assertion in the latter case that the deed should be operative, if suffered to remain uncanceled, to pass the title, or that the defense to the deed should rest in extrinsic evidence, liable to loss, or be available only in equity. It is sufficient to call into exercise the jurisdiction of the Court, that the deed casts a cloud over the title of the plaintiff. As in such case the Court will remove the cloud, by directing the cancellation of the deed, so it will interfere to prevent a sale from which a conveyance creating such a cloud must result. *Pitney v. Huggins*, 15 Cal. 127.

18. L. conveys real property by deed to the wife of M. for \$4,000, which sum is recited in the deed as the consideration. Subsequently M. and wife convey, by their joint deed, the property to plaintiff, for the consideration recited therein of \$9,500. This deed was acknowledged by both husband and wife, and on the acknowledgement two certificates were indorsed by the notary, both of which were sufficient in form as to the acknowledgement of the husband, but only one of them was sufficient as to the acknowledgement of the wife; the other was defective. The deed was recorded with the defective certificate, the other being omitted. Later still, defendants, H. and H., recovered judgment against M., which was duly docketed, and became, from the time of its docketing, a lien on his property in the county in which was situated the property embraced in the deed from L. to M. and wife. Upon this judgment execution was issued, placed in the hands of the sheriff, who levied it on the property in said deed, and adver-

deed for sale all the right, title and interest which M. had therein at the time said judgment became a lien, etc. Plaintiff files his bill to enjoin this sale. *Held*, that an injunction lies; that the property acquired under the deed from L. to the wife of M. became community property, and as such was subject to the absolute disposition of the husband, and passed in full title to plaintiff under the deed to him. *Id.*

19. The true test by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; otherwise not. *Id.*

20. Cloud upon titles.—See further *Ramsdell v. Fuller*, 28 Cal. 38; *Thompson v. Lyrick*, 29 Cal. 189; see *ante*, Nos. 1, 4, 5; *post*, No. 27.

21. Plaintiffs are owners of mining claims located in the bed of a creek, and defendants own claims situated on a hill in the vicinity. The refuse matter washed from defendants' claim is deposited on plaintiffs' claims, to such an extent as to render the working of them impracticable. Plaintiffs' claims were first located, and are valuable only for the gold they contain. *Held*, that plaintiffs are entitled to damages for the injuries done their claims by such deposit, and to an injunction against the same in future; that the enjoyment of their claims lies in the use necessary to obtain the gold, and that to interrupt this use is to take away the opportunity to enjoy, and defeat the object for which they were located and taken possession of. *Logan v. Discoll*, 19 Cal. 623.

22. Injunction is the proper remedy to stay a threatened injury to a right of way. *Kittle v. Pfeiffer*, 22 Cal. 485.

23. The construction of a reservoir across the bed of a ravine, for the purpose of collecting the water flowing down the same, to be used in irrigating a garden or fruit trees, give the party constructing the same a vested right of property in the reservoir, and the right to have the water flow into the same, of which he cannot be divested by persons subsequently entering for mining purposes, and a Court of equity will enjoin miners thus entering from injuring the reservoir, or diverting the water therefrom. *Rupley v. Welch*, 23 Cal. 452.

24. Where the statute, under which proceedings for the condemnation of land for road purposes is taken, is unconstitutional, or its provisions are not strictly pursued, or notice is not given to the owner of the land, or the compensation is not tendered to him, a perpetual injunction against opening the road will be granted. *Curran v. Shattuck*, 24 Cal. 431.

25. A perpetual injunction against opening a road, under proceedings which have been taken, does not prevent laying out a road at any future time, over the same land, whenever the proper steps are taken to acquire the right of way, and the right has been secured. *Id.*

26. An injunction will be granted, at the suit of the mortgagee of real property, to restrain the commission of waste upon the mortgaged premises; but before it is granted, it must be made to appear that the commission of the threatened waste will materially impair the value of the mortgaged property, so as to render it inadequate security for the mortgaged debt, and that the defendants are insolvent, or unable to respond in damages for the threatened injury. *Robinson v. Russell et al.*, 24 Cal. 473.

27. A sale by a sheriff of real estate, upon an execution, against the grantor, will, even if not effectual to pass the title to the purchase, create a doubt as to the validity of the grantee's title, and cast a cloud upon it, and the grantee can maintain an action to enjoin the sale. *England v. Lewis et al.*, 25 Cal. 357.

28. One who is the owner of land, and in possession of the same, is not entitled to an injunction to restrain a sheriff from executing a writ of restitution, issued on a judgment, rendered against third parties, to which judgment the plaintiff is a stranger. *Tevis v. Ellis et al.*, 25 Cal. 516.

29. *Tomlinson v. Rubio*, 16 Cal. 202; disapproved of by Currey, J. *Id.*

30. In an action brought by the State to procure the cancellation of a patent for land void without authority of law, where the person claiming under the patent is engaged in removing mineral from the land, the State is entitled to an

injunction restraining the defendant from removing the same. *People v. Morrell*, 26 Cal. 352.

31. Where a bill is filed by the people, on the relation of the Attorney-General, to enjoin the State Treasurer from paying money out of the Treasury, on the ground of the unconstitutionality of the act directing the Treasurer to make the payment, and the Court, on the final trial, deny the injunction, the judgment denying the injunction should not contain a clause adjudging and decreeing that the Treasurer pay over the money as required by the law. *People v. Pacheco*, 27 Cal. 227.

32. Courts of equity may restrain the commission of a trespass about to be committed, by taking down fences and opening a road through the plaintiff's land, in pursuance of an order of the Board of Supervisors, prematurely made. *Grigby v. Burnett*, 31 Cal. 406. See post, No. 36-38; *Moore v. Massini*, 32 Cal. 694.

33. If plaintiff prevail in an action to quiet title, a decree inserted in the judgment enjoining defendant from making any further contest on plaintiff's title, even if not strictly correct, does not injure defendant. Such decree does not preclude defendant from availing himself of an after acquired title. *Reed v. Childerswood*, 32 Cal. 109.

34. **Second subdivision, insuperable injury.**—Where premises containing deposits of gold are held under a patent from the United States, an injunction lies to prevent miners from excavating ditches, digging up the soil, and flooding a portion of the premises for the purpose of extracting the gold. *Boggs v. Merced Mining Co.*, 14 Cal. 319; *Henshaw v. Clark*, 1 Cal. 464.

35. Where the plaintiff pretends no title to the soil, but only to a franchise, sale of the realty can work no irreparable damage, or throw a cloud on his title. *DeWitt v. Hays*, 2 Cal. 463.

36. A writ of injunction will lie, to restrain trespass in entering upon a mining claim, and removing auriferous quartz from it, where the injury threatens to be continuous and irreparable. It comports more with justice to both parties to restrain the trespass than to leave the plaintiff to his remedy at law. *Merced Mining Co. v. Fremont*, 7 Cal. 317.

37. The removal of gold from a mine is emphatically taking away the essence of the estate, and comes within that class of trespass in which injunctions are now universally granted. *Id.*

38. An injunction will not be granted in aid of an action of trespass, unless it appear that the injury will be irreparable and cannot be compensated in damages. *Waldron v. Marsh*, 5 Cal. 119.

39. Where a bill avers that the plaintiffs are the owners and in possession of a tract of land; that defendants are insolvent, and threaten to, and will, enter upon said land, and by excavations, embankments, and diverting valuable springs and streams thereon, despoil it of the substance of the inheritance, and create a cloud upon plaintiff's title, injunction lies. *Bensley v. The Mountain Lake Water Co.*, 13 Cal. 306.

40. Where premises containing deposits of gold are held under a patent from the United States, an injunction lies to prevent miners from excavating ditches, digging up the soil, and flooding a portion of the premises, for the purpose of extracting the gold. *Henshaw v. Clark*, and one hundred and three *Chinamen*, 14 Cal. 460.

41. Plaintiff takes up two hundred and twelve acres of land under the Possessory Act of this State, incloses it, and plants it with fruit and ornamental trees and shrubbery. Defendants enter upon a portion of the tract for mining purposes, dig up and destroy the trees and shrubbery, and threaten to continue such trespasses—claiming the right so to do by paying to plaintiff the money value of the trees, etc. Plaintiff sued for damages for the trespasses committed, and asks a perpetual injunction against future trespasses—verdict: "We the jury award the plaintiff forty-two dollars damages." Judgment accordingly—the Court refusing to perpetuate the injunction. Plaintiff had recovered a similar verdict in a previous suit. *Held*, that the verdict is conclusive of the rights of the parties, and that perpetual injunction against the trespasses should issue; that, the nature of the property destroyed, and threatened to be destroyed, is such that the injury is irreparable; that plaintiff

is not bound to take the mere money value of the trees, as they may possess a peculiar value to him. *Daubenspeck v. Grear*, 18 Cal. 443.

42. An action will lie to enjoin a threatened trespass on land, where the trespass, if committed, would destroy the substance of the land, which could not be specifically replaced. *Moore v. Massini*, 32 Cal. 590. [See authorities therein cited.]

43. Injunction when plaintiff is in possession. An injunction lies to restrain a threatened injury to real property, in the nature of a waste, even if the plaintiff is in possession of the land. *Id.*

44. An injunction ought not to be granted, unless equitable circumstances, beyond the mere allegation of irreparable injury, be shown—as insolvency, impediments to a judgment at law, or to adequate legal relief, or a threatened destruction of the property, or the like. *Burnett v. Whitesides*, 13 Cal. 156.

45. Cutting, destroying, or removing growing timber, is sufficient ground for an injunction, without any allegation of insolvency. *Natoma Water and Mining Co. v. Clarke*, 14 Cal. 544.

46. Waste, injunction to restrain.—An injunction lies to restrain threatened injury to real property, in the nature of a waste, even if the plaintiff is in the possession of the land. *Moore v. Massini*, 32 Cal. 590.

47. In cases of waste, if anything is about to be abstracted from the land which cannot be restored *in specie*, it is no objection to the injunction that the party making it may possibly recover what others may deem an equivalent in money. *Hicks v. Michael*, 15 Cal. 107.

48. Against the cutting of timber the owner of real property is entitled to the preventive remedy of injunction. Whilst the timber is growing, it is part of the realty, and its destruction constitutes that kind of waste, the commission of which a Court of equity will, upon petition, restrain. When once cut, the character of the property is changed; it has ceased to be a part of the realty, and has become personalty, but its title is not changed. It belongs to the owner of the land as much afterwards as previously, and he may pursue it into whose-soever hands it goes, and is entitled to all the remedies for its recovery which the law affords for the recovery of any other personal property wrongfully taken or detained from its owner. And if he cannot find the property to enforce its specific return, he may waive the wrong committed in its removal and use, and sue for the value as upon an implied contract of sale. *Halleck v. Mear*, 16 Cal. 574.

49. After a decree foreclosing a mortgage, the mortgagor in possession is not, until a sale is made under the decree, accountable, either for rents, or for use and occupation, and is subject to no liability, except that he may be restrained from the commission of waste. *Whitney v. Allen*, 21 Cal. 233; *Robinson v. Russell*, 24 Cal. 473.

50. In an action for a trespass upon a mining claim where the complaint avers that defendants are working upon and extract the mineral from the claim, and prays for perpetual injunction, and the answer admits the entry and work, and takes issue upon the titles; if the jury to whom the issue of title is submitted finds in favor of the plaintiffs, it is the duty of the Court to decree the equitable relief sought, and enjoin defendants from future trespasses. *McLaughlin v. Kelly*, 22 Cal. 211.

51. An injunction to stay waste will not be granted where the plaintiff does not show that he is entitled to the reversion. *Pennie et al. v. Marsden et al.*, Oct. T. 1867.

52. A purchaser of standing timber cannot obtain an injunction to stay waste committed by the cutting of the timber: 1st, because as to him the cutting of the timber is no waste, neither the remainder in fee simple nor in fee tail being vested in him; 2d, because being a mere purchaser of the timber, he has adequate relief at law, if it does not appear that the defendants are irresponsible. *Hardy v. Duncan et al.*, April T. 1866.

53. Injunctions to restrain injuries in the nature of waste should not be issued before the hearing on the merits, except in cases of urgent necessity, etc. *Hicks v. Michael*, 15 Cal. 107.

54. When it will not lie to restrain the enforcement of judgments, sales under executions, etc.

55. A vendor of real estate made a conveyance of it to the vendee, leaving a balance of the purchase money unpaid. The vendee afterwards mortgaged the same property to a third person, who knew of the vendor's claim for unpaid purchase money. The vendor brought an action at law against the vendee, obtained judgment for the balance due, issued execution, and sold the interest of the vendee in the property. The mortgagee afterwards foreclosed his mortgage, and was about to sell the property. The purchaser at the previous sale obtained an injunction to stay the sale, which was afterwards dissolved by the Court, on the ground that he had purchased merely the vendee's equity of redemption, as the sale was subject to the rights of the mortgagee. *Held*, that this judgment of the Court below was correct, and that the claim of the purchaser to be subrogated to the equitable lien of the vendor, if available at all, must be asserted in a separate equitable action. *Allen v. Phelps*, 4 Cal. 256.

56. An injunction will not lie to restrain the collection of a judgment against the plaintiff, on the ground that the judgment was for a balance of purchase money of land under covenant for a good title, while in fact the grantor had no title, as long as the purchaser against whom the judgment was taken, and who seeks to enjoin it, remains in possession. *Jackson v. Norton*, 6 Cal. 187.

57. The fact that suit in ejectment has been commenced against the judgment debtor by the real owner does not entitle him to enjoin the judgment. He can only avail himself of the covenants of his grantor when he has been evicted, unless he offers to surrender the lands to his grantor.

58. Neither does the allegation that the purchaser (plaintiff in equity) has put valuable improvements on the land, and that he has paid a portion of the purchase money, and that his grantor and judgment creditor is insolvent and without visible property, take the case out of the rule. *Id.*

59. Courts of equity will not interfere to enjoin a judgment not manifestly wrong, simply because of a defect in the evidence. *Pico v. Sunol*, 6 Cal. 294.

60. Where a party failed to obtain the proper certificate of the referee, relying on the verbal assurance of the attorney on the other side that he would agree to a statement, such party cannot be considered free from fault and negligence, and he is not in a position to invoke the aid of a Court of Equity to enjoin a judgment obtained against him. *Phelps v. Peabody*, 7 Cal. 50.

61. Courts of Equity will only interfere to enjoin a judgment at law rendered against a party by reason of fraud or accident, unmixed with any fault or negligence of himself or his agents. *Id.*

62. Where a verdict has been obtained at law against a defendant, and he has neglected to apply for a new trial within the time appointed by the proper Court of law, Courts of equity will not entertain a bill for an injunction on the ground that the original demand was unconscientious. *Id.*

63. If a party enters judgment for too much, or before the whole amount is due, it is not conclusive, but only *prima facie* evidence of fraud to avoid the judgment. *Patrick v. Montader*, 13 Cal. 442, overruling *Thaffe v. Josephson*, 7 Cal. 356.

64. An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of a party or counsel, where, if the neglect were excusable, full relief might have been had on motion in the original action. *Borland v. Thornton*, 12 Cal. 440.

65. To obtain the aid of chancery to vacate a judgment, a party must show that he has exhausted all proper diligence to defend in the suit in which judgment was rendered. *Riddle v. Baker*, 13 Cal. 304.

66. The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the Court issuing the writ. *Sparks v. De la Guerra*, 14 Cal. 108.

67. A defendant having no defense to an action, cannot go into equity and enjoin a judgment by default, on the ground that the sheriff's return of service on him is false, and that in fact he had no notice of the proceeding. *Gregory v. Ford*, 14 Cal. 141; *Gibbons v. Scott*, 15 Id. 286; *Logan v. Hillegass*, 16 Id. 202.

68. If a judgment by default be void because entered by the clerk, without authority, that fact constitutes no ground for equity to interfere. *Chipman v. Bowman*, 14 Cal. 157.

69. Where a party moves for a new trial and fails, he cannot on the same facts go into equity to enjoin the judgment rendered. *Collins v. Butler*, 14 Cal. 223.

70. Defendant, as coroner and acting sheriff, levied on and advertised for sale all the right, title and interest of T. in certain horses and cattle in the hands of a receiver appointed in a suit between J. and T., as partners. *Held*, that the plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable, and this must appear by a clear showing of plaintiff's right to the property and defendant's insolvency. *More v. Ord*, 15 Cal. 206.

71. Plaintiff purchased certain property under a sale on a decree foreclosing a mortgage executed by one Pender, to which decree all persons in interest were parties, among them defendants here. The interest of defendants Wemple and Pender was foreclosed in the usual form. Plaintiff seeks to enjoin a sale of the premises under a decree in favor of Wemple against Pender, to enforce a mechanic's lien. Plaintiff was not a party to the suit of *Wemple v. Pender*, and has not yet got a sheriff's deed. *Held*, that injunction does not lie; that plaintiff is but the purchaser of an equity, the decree of foreclosure not cutting off the rights of the mortgagor, Pender; that he, being entitled to possession until the sheriff's deed, and also having the equity of redemption, could dispose of this right, and it might, under our statute, be sold for his debts; that if he chose to recognize the validity of Wemple's lien, or its enforcement, or sale under judgment, plaintiff cannot complain, his rights not being affected by the proceedings, as he was not a party. *Macovich v. Wemple*, 16 Cal. 104.

72. If a judgment by default be void, because of the absence of the seal of the District Court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the sheriff of the service of summons and copy of complaint, or because of irregularities of the clerk in entering the judgment, an injunction to restrain the enforcement thereof does not lie. *Logan v. Hillegass*, 16 Cal. 200.

73. Courts of equity are ever ready to grant relief from sales made upon their decrees, where there has been irregularity in the proceedings, rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree, as when they have been misled by a mistake of fact as to the condition of the property, or the estate sold, provided application be made to them in suits in which such decrees are entered, within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others. *Goodnow v. Ewer*, 16 Cal. 470.

74. The nature and extent of the relief in such cases are matter resting very much in the sound discretion of the Court. As a general rule, the purchaser will be released and a re-sale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or the parties, to allow the sale to stand. But when the relief is sought in one action from a purchase made upon a mistake of law to the effect of a decree rendered in another action, it seems that the ordinary rules as to mistakes of law should apply, and from such Courts of equity seldom relieve. *Id.*

75. Where, in suit before a Justice of the Peace, defendant answers, disputing plaintiff's claim, and afterwards, on a day set for trial—plaintiff being present, but defendant absent, and no one appearing for him—the Justice renders judgment for plaintiff, without evidence and "by default," as the docket reads. *Held*, that if the Justice erred in his judgment, either upon the merits or as to form, the remedy is by appeal, and that such error cannot be corrected by bill in equity to set aside the judgment and enjoin execution and sale thereon. *Hunter v. Hoole*, 17 Cal. 418; *Comstock v. Clemens*, 19 Id. 77.

76. Plaintiff has a deed of property from H. and P. Subsequently, N., execution creditor of H. and P., causes the sheriff to levy on the property. Plaintiff files his bill to restrain the sale, as casting a cloud on his title. Court below found plaintiff's deed to be in effect a mortgage. *Held*, that the bill must be dismissed; that the purchaser at the sheriff's sale would only

acquire the interest of the judgment debtors, H. and P.; that plaintiff's rights, as mortgagee, would be unaffected by the sale, and hence there is no necessity for equity to interfere in his behalf. *Purdy v. Irwin*, 18 Cal. 350.

77. A prior attaching creditor, whose attachment has been levied on the personal property of the defendant, cannot, after the recovery of a judgment, be enjoined from selling the property attached, under execution, at the suit of a junior attaching creditor not to do so, but to pursue some other course, to depart from which would result in irreparable mischief to the plaintiff. *Domeo v. Stearns*, 30 Cal. 114.

78. If a judgment upon which an execution issues and the execution itself are void upon their face, an injunction will not be granted to restrain a sale of property levied on under the execution, or the issuing of any other execution on the judgment. *Sanchez v. Carriaga*, 31 Cal. 170.

79. Taxes and assessment.—When the collection will or will not be restrained.

80. Where an assessment is laid upon land in the city of San Francisco, it is not within the province of a Court to interfere and order a sale of the land by a decree rendered in an injunction suit, instituted by the owner of the land for the purpose of preventing a sale under an ordinance of the city. *Weber v. The City of San Francisco*, 1 Cal. 455.

81. It seems that if the injunction bill had been filed before the work was commenced, the Court would have felt bound to inquire into the regularity of the assessment. *Id.*

83. In all cases involving simply the question of taxation, the issue is strictly one at common law and Courts of equity can take no cognizance thereof; and in such case, to grant an injunction is error. *Minturn v. Hays*, 2 Cal. 590.

84. The fact that the assessment for State and county taxes for 1855-6, in San Francisco county, was not based on the valuation of the City Assessor, as required by the act creating the Board of Supervisors, passed in 1851, is not a sufficient ground for an injunction upon the collection of the taxes, as the party could have appealed to the Board of Equalization if aggrieved. *Merrill v. Gorham*, 6 Cal. 41.

85. An injunction will not lie to restrain the collection of taxes due on property unless it be shown that the injury resulting from the collection, to the owner, would be irreparable. An averment of this character must appear in the bill, and if denied, it must be sustained at the hearing. *Ritter v. Palk*, 12 Cal. 298.

86. A bill in equity will lie to restrain a sale of property for illegal taxes, since a tax deed is made *prima facie* evidence of title. *Palmbr v. Bolling*, 8 Cal. 388, and *Fremont v. Bolling*, 11 Cal. 387, overruling *Deno v. Hays*, 3 Cal. 463, and *Robinson v. Gaar*, 6 Cal. 275.

87. Where an assessment and sale for taxes would be void, and the matters making them void do not appear on the face of the Tax Collector's deed, but must be shown by intrinsic proof, and the deed upon its face would be *prima facie* valid, injunction lies to restrain the sale. *Burr v. Hunt*, 18 Cal. 303.

88. Injunction, when it should not be granted.—An order of injunction whereby the bringing of an action is restrained, will be reversed, notwithstanding an injunction bond has been given. *King v. Hall*, 5 Cal. 82.

89. Where the complaint and evidence show that a defendant is in possession of a tract of land, and claiming and holding under an adverse title, and the weight of evidence is in favor of his title, an injunction will not be granted on the application of a party claiming title to the land, to prevent the defendant from cutting timber thereon. *Smith v. Wilson*, 10 Cal. 528.

90. Plaintiffs file their bill in equity to enjoin defendants from diverting a certain quantity of the water of Bear river, alleging that their right to one thousand inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes; that such quantity was necessary for their use, and that defendants had diverted the same to their damage, etc. Plaintiffs had verdict and judgment for \$21,800 damages.

Held, that the averments are insufficient to entitle plaintiff to an injunction, the scope of the bill being simply to enforce in equity plaintiffs' alleged right to one thousand inches of water, on the sole ground that it was adjudged as their right in the former suit. *McDonald v. Bear River and Auburn W. & M. Co.*, 15 Cal. 148.

91. A stranger to the title of real property, though in possession, cannot go into equity and enjoin the purchasers and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by them of a third person who does not complain. Having no title himself, it is immaterial to him whether he be evicted by such purchasers or their vendor. *Treadwell v. Payne*, 15 Cal. 496.

92. Defendants claiming title under a Mexican grant, and a patent issued upon its confirmation by the United States, bring ejectment against plaintiffs for certain premises in their occupation; plaintiffs, claiming as United States pre-emptioners, then file their bill in the same Court to enjoin defendants from introducing in evidence or using the survey, plat or patent, on the trial of the ejectment, until the determination of an action, averred to be pending in the United States Circuit Court by the United States against defendants and others claiming with them, to annul the survey, plat and patent, on the ground of fraud in the survey, and in procuring the patent, the bill also averring such fraud. *Held*, that injunction does not lie; that the patent, until set aside, is conclusive evidence of the validity of the grant, of its recognition and confirmation, and also of the regularity of the survey, and of its conformity with the decree of confirmation; and that defendants, claiming to be pre-emptioners upon land of the United States, have no standing in Court to resist the patent. *Ely v. Frisbie*, 17 Cal. 250.

93. Where the Board of Supervisors of a county allowed an account presented for services as tax collector, and the auditor drew his warrant in favor of E. for the amount, and he assigned it to defendant M., a *bona fide* purchaser, without notice: *Held*, that the county cannot go into equity to cancel the warrant and enjoin its collection as against M., on the ground that the account was false and fraudulent as to some of its items, and was allowed by the Board through ignorance of the facts, and mistake; that the Supervisors were acting within the scope of their authority, and the county cannot visit upon an innocent party the consequences of their negligence. *El Dorado County v. Elstner*, 18 Cal. 144. Cope, J.

94. Where the Board of Supervisors of San Joaquin, under the Act of 1860, (Stat. 1860, 317) authorizing them to levy a special tax for the construction and repair of seven public highways leading from the city of Stockton, the fourth of which was "a road running from the limits of Stockton via Hamilton's ranch, known as the Sonora road," levied and collected the tax, and then, July 10th, 1860, passed an order locating the route of this fourth road, along which plaintiffs lived, and afterwards assessed the damages to the owners of land, etc., but before they had obtained the right of way for this road, passed another order in March, 1861, annulling the first order and changing the location of the road, which rendered the lands of plaintiffs of less value: *Held*, that the first order of laying out the road was unexecuted; that no rights of plaintiffs had vested, and that the Board had power to make the second order; that the first order was not in the nature of a power exercised and exhausted, but was at most a proposed mode of executing a power, which could be changed at any time before rights had vested under it. *Burkett v. Supervisors of San Joaquin*.

95. The mortgagee of a lot, on which a house is standing, cannot enjoin the mortgagor, or his assigns, from removing the house from the lot, except upon proof that the lot, without the house, will be an inadequate security for the mortgage debt. *Buckout v. Swift*, 27 Cal. 434.

96. An order of a Board of Supervisors, laying out a road which is unconstitutional and null and void upon its face, does not affect or cloud the title to the land over which it passes, and an injunction will not be granted to restrain the carrying of the order into effect, but the party will be left to his remedy at law. *Leach v. Day*, 27 Cal. 643.

97. Injunction to restrain trespasses. An injunction will not be granted to

restrain the commission of trespasses where the party complaining has a complete and adequate remedy at law. *Id.*

98. The trustees of a mining corporation will not be enjoined from selling stock, for unpaid assessments, in cases where the assessment is levied for the purpose of paying the proper and legal expenses of the company, if the assessment does not exceed the amount allowed by law. *Sullivan v. Triunfo G. & S. M. Co.*, 29 Cal. 585.

99. When the Court is satisfied that a wharf erected in tide waters and upon soil thereunder belonging to the State, is not a public nuisance, an injunction should be refused or dissolved, if one has been temporarily granted. *People v. Davidson*, 30 Cal. 379.

100. The District Courts, as Courts of equity, have no power to decree the destruction, or to enjoin a purpresture caused by the erection of a wharf in tide waters, and upon the soil thereunder belonging to the State, without a license from the State, unless it is or will be a public nuisance, or is or will be followed by some form of irreparable damage, or unless it is or will be a hindrance to the execution of some Legislative Act relating to fishery or to commerce, or navigation. *Id.*

101. An injunction will not be granted to a landlord to restrain tenants from removing a house, upon the ground that the security for the suit will be impaired by the removal, even though there is an express covenant in the lease that the buildings on the land shall stand as security for the rent, unless it appears that by the removal of the building the security will be left inadequate. *Perrine v. Marsden*, Oct. T. 1867.

102. When there is no pretense that any injury was occasioned wilfully by the defendant, and there is no finding of unskillfulness, an injunction will not issue to prevent the exercise of his right to irrigate his crops, although an annoyance or injury may be thereby occasioned to the plaintiffs. *Gibson v. Puchla*, Oct. T. 1867.

103. Injunction will not issue when there is a remedy at law by motion.—If a judgment by default be void, because of the absence of the seal of the District Court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the sheriff of the service of the summons and copy of complaint, or because of irregularities of the Clerk in entering the judgment, an injunction to restrain the enforcement thereof does not lie. The remedy is by application to the District Court to quash the execution. (See authorities cited by appellant.) *Logan v. Hillegas*, 18 Cal. 200.

104. Injunction, effect of.—An injunction operates to restrain not only the party enjoined, but other Courts on the ground of judicial comity. *Engels v. Lubeck*, 4 Cal. 31.

105. An injunction cannot be granted affecting the rights and interests of parties who have no opportunity of being heard, and who are not secured by such bond as would compensate them for the injury and loss they might sustain in case the writ was improperly issued. *Patterson v. Yuba County*, 12 Cal. 105.

106. Injunction, revival of.—The Court below may, on proper showing, revive an injunction once dissolved, or grant an injunction previously denied, and this is the extent of its power when the matter has been once disposed of. *Hicks v. Michael*, 15 Cal. 107.

107. If a preliminary injunction is dissolved upon granting a nonsuit, and the judgment is afterwards reversed on appeal, the plaintiff, upon a proper application, will be entitled to a renewal of the injunction upon filing the remittitur in the Court below. *Harris v. McGregor*, 29 Cal. 124.

108. When a judgment is reversed and the cause remanded for a new trial, it is returned to the lower Court for a trial upon the issues, and it stands in the same attitude in all respects as before the former trial. If the plaintiff were entitled to an injunction before the former trial, and the injunction was ordered, they were entitled to retain it upon the cause being remanded for a new trial. *Bee v. Winder*, Oct. T. 1867.

109. Granting and continuing, discretionary.—Granting and continuing

injunctions rests very much in the sound discretion of the Court, to be governed by the nature of the case. *Hicks v. Michael*, 15 Cal. 107.

110. Abuse of the writ of injunction should be guarded against. *De Witt v. Hays*, 2 Cal. 463.

111. The granting and continuing of injunctions in cases of alleged trespasses on land claimed by plaintiff, where the injury is likely to be irreparable, are to some extent matters of discretion, and this discretion should always be exercised in favor of the party most liable to be injured. *Hicks v. Compton*, 18 Cal. 206.

112. If the plaintiffs permit the defendants to remain in possession of a mining claim several months, without interference, working it as their own and expending large sums of money in developing it, a Court of equity will require a very clear and strong showing to induce it to grant, or entertain, a preliminary injunction to stop the work. *Real del Monte Co. v. Pond Co.*, 23 Cal. 82.

113. When the title to the property is in dispute, the question, whether the creditors are solvent and able to respond in damages, forms an important element in passing upon an application for an injunction pending the litigation. *Id.*

114. In this case, the Supreme Court refused to interfere with the discretion of the Court below, in denying an injunction sought by a settler upon public mineral lands, to protect his improvements—a dwelling house, milk house, barn, garden, dam, etc.—against miners who were working the bed of a ravine, a short distance in front of the house. See facts. *Stade v. Sullivan*, 17 Cal. 102.

115. Injunction part of the judgment.—An injunction granted upon the rendition of final judgment, is a part of the judgment. *McGarrahan v. Maxwell*, 28 Cal. 84.

116. General rules.—In our Courts the rules and principles of equity practice remain unaltered, and the writ of injunction can only be issued where the case is one of equity jurisdiction. *Minburn v. Hays*, 2 Cal. 590.

117. A party who has his remedy provided by law, but does not avail himself thereof, and fails to show wherein he is injured, is not entitled to relief in a Court of Chancery. *Merrill v. Gorham*, 6 Cal. 41; *Hendy v. Duncan*, April T. 1866; *Leach v. Day*, 27 Cal. 643.

118. In an action at law, where parties seek equitable relief, the grounds of equitable interposition should be stated subsequently to, and distinct from, those upon which the judgment at law is sought. *Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 544.

§ 113. *At what time it may be granted and what is required to obtain it.*

The injunction may be granted at the time of issuing the summons upon the complaint; and at any time afterwards, before judgment, upon affidavits. The complaint in the one case, and the affidavits in the other, shall show satisfactorily that sufficient grounds exist therefor. No injunction shall be granted on the complaint, unless it be verified by the oath of the plaintiff, or some one in his behalf, that he, the person making the oath has read the complaint, or heard the complaint read, and knows the contents thereof, and the same is true of his own knowledge, except the matters therein stated on information and belief, and that as to those matters he believes it to be true. When granted on the complaint, a copy of the complaint and verification attached shall be served

with the injunction ; when granted upon affidavit, a copy of the affidavit shall be served with the injunction.

N. Y. Code, § 220.

1. When a restraining order or an injunction is sought upon the complaint itself, it is the usual practice to present the complaint, in advance of the filing, to the Judge, and obtain the order or the allowance of the writ; and such practice is regular, and not in conflict with our statute. *Heyman v. Landers*, 12 Cal. 107.

2. In such case the order does not take effect until the filing the complaint and the undertaking required. *Id.*

3. A party against whom an injunction has been issued is not bound to obey it until after due service thereof on him. Giving him verbal notice that an order enjoining him has been made, is not sufficient. *Elliott v. Osborn*, 1 Cal. 396.

4. It seems if a party be in Court at the time an injunction order is made, and thus has personal knowledge of the order, that he would be bound thereby. *Per Bennett J.* *Id.*

5. An injunction order, and due service thereof on the party enjoined, do not operate to enlarge the time within which an act is required to be done by the party procuring the order. *Id.*

6. The statute points out no mode for service of an injunction; but in conformity with the provision relative to the summons, delivery of a copy is essential to personal service where that is required; but whether it would be necessary to exhibit the original, unless specially requested by the party served, no opinion is here expressed. *Edmondson v. Mason*, 16 Cal. 386.

7. A writ placed in the sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. *Whitney v. Butterfield*, 13 Cal. 335.

8. When granted on affidavits.—The plaintiff is entitled to an injunction at the time of issuing the summons on the complaint alone, if it makes a proper case, and is verified in the manner stated in the 113th section ; but if he asks for an injunction at any time thereafter, he must do so upon affidavits. *Falkenberg et al. v. Lucy et al.*, A. T. 1868.

§ 114. Injunction after answer.

An injunction shall not be allowed after the defendant has answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the Court or Judge granting or refusing the injunction.

N. Y. Code, § 221.

1. When the answer to a bill for an injunction denies all the equity, if any, of the bill, a preliminary injunction should not be granted. *Orrendall v. Woods*, 6 Cal. 449.

2. When the equities of a complaint are fully denied by affidavits on the part of defendant, an application for an injunction, *pendente lite*, should be denied. *Gagliardo v. Crippen*, 22 Cal. 362.

§ 115. Security upon injunction. Damages, how ascertained.

On granting an injunction, the Court or Judge shall require, except where the people of the State are a party plaintiff, a written undertaking, on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the

party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the Court finally decide that the plaintiff was not entitled thereto.

N. Y. Code, § 222. See *post*, § 650; Bancroft's Forms, 562; Abb. Forms, 1392-1396.

1. City and county of San Francisco not required to give a bond. See *ante*, note (a) to § 76.

2. The State, and State officers, etc., are also exempted. See *ante*, note (b), to same section.

3. An injunction order is inoperative until the undertaking required by the statute be given. *Elliott v. Osborne*, 1 Cal. 396.

4. Parties.—See § 4, note, "Real parties in interest." Also, § 13, No. 41.

5. Complaint.—See § 39, No. 328.

6. Action on the bond.—Where an injunction is dissolved, and the suit in which it issued is dismissed by the action of the party, this is no admission that the injunction was improperly sued out. In such case, to maintain an action on the bond, it must be shown that there was no proper cause for the injunction. *Galson v. Whiteside*, 3 Cal. 309.

7. An injunction bond, though given to all the obligees by name, and using no words directly expressing a several obligation, yet necessarily creates a several liability, the design of it being to secure each of all of the obligees from damages or injury. *Summers v. Furish*, 10 Cal. 347.

8. The usual bond being given, an order was made to show cause (Aug. 29th) why an injunction should not issue. A restraining order, in the "mean time," was issued. The case was continued until October 10th, when, on hearing, the order was dissolved, injunction denied and suit dismissed. Action on the bond: *Held*, that the restraining order embraces the time between its issuance and the hearing, and that damages may be had beyond August 29th. *Prader v. Grim*, 13 Cal. 585.

9. No recovery can be had on a bond purporting to be the joint bond of the principals and sureties, but signed by the latter only. *City of Sacramento v. Dunlap*, 14 Cal. 421.

10. Otherwise, as to undertakings under our system. They are original and independent contracts on the part of sureties, and do not require the signature of the principal. *Id.*

11. The grounds of the injunction cannot be inquired into in suit upon an injunction bond. The Court in which the injunction suit is tried must determine whether the injunction was properly or improperly issued; and after such determination, and not before, does an action lie on the bond. *Dowling v. Polack*, 18 Cal. 625.

12. A judgment dismissing a suit in which a temporary injunction had been granted for want of prosecution, amounts to a determination by the Court that the injunction was improperly granted; and after such judgment, suit lies upon the injunction bond. *Id.*

13. Damages.—A party filing an undertaking to obtain an injunction, is deemed to have waived the right to insist on a trial by jury, and consented that the damages may be ascertained in the mode prescribed by the statute; and an order of reference is no violation of the constitutional right to trial by jury. *Russell v. Elliott*, 2 Cal. 245.

14. The Court may order a reference to ascertain the damages sustained by an injunction issued without cause. *Russell v. Elliott*, 2 Cal. 245.

15. In an action for damages on an undertaking given on suing out an injunction, the defendants cannot object, by way of defense, that they ought not to pay the damages which they contracted to pay, because the business which they enjoined, and for the stoppage of which damages are claimed, was a public nuisance. *Cunningham v. Breed*, 3 Cal. 384.

See 18 Cal. 625
on remedy

16. In an action upon an injunction bond, to recover damages for the wrongful issuing of a writ, it was held, that the amount paid to counsel as a fee to procure the dissolution of the injunction was properly allowed as a part of the damages. *Ah Shate v. Quan Han*, 3 Cal. 216.

17. Generally, the recovery of counsel fees, as a part of the damages, is not allowed as where the loss is consequential, but where the loss is direct, as in the case of an improper commencement and prosecution of a suit or other process in a suit, it should be allowed. *Id.*

18. In an action on an injunction bond, the judgment of dissolution is conclusive, and the only question is the amount of damage sustained. *Gelston v. Whitesides*, 3 Cal. 309. [This case is overruled in *Dawling v. Polack*, 18 Cal. 625.]

19. Counsel fees for dissolving this order are recoverable on the bond; and this, though the fee was paid after August 29th, provided the retainer were before. *Prader v. Grim*, 13 Cal. 585.

20. In an action on an injunction bond, the fees of an attorney employed to resist injunction cannot be recovered as damages, unless they have been paid. The fact that the plaintiff is subject to a liability to his attorney, without showing actual payment to him, is insufficient. *Wilson v. McEvoy et al.*, 25 Cal. 170.

21. The plaintiff, in an action on an injunction bond, is not entitled to a judgment for damages for expenses incurred for attorneys' fees and in procuring testimony, unless he proves that he has actually paid the attorney and the expenses of procuring testimony. *Prader v. Grim et al.*, 28 Cal. 11.

22. When an officer is enjoined for paying over money in his hands, legal interest can only be recovered as damages for its detention in an action on an injunction bond. *Lally v. Wise*, 28 Cal. 539.

§ 116. Order to show cause why injunction should not be granted.

If the Court or Judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

N. Y. Code, § 223. Abb. Forms, 1909.

1. Length of notice to be given.—Notice of an application by plaintiff for an injunction must be given for the length of time presented by section 517 of the Practice Act. If given for a shorter time, and defendant does not appear, he may treat an injunction thus obtained as granted without notice, and move to dissolve the same under section 118. *Johnson v. Wide West M. Co.*, 22 Cal. 479.

2. Generally.—Even if a Chancellor has no power, under the one hundred and sixteenth section of the Practice Act, to require an undertaking upon the issuance of the restraining order, still, having taken jurisdiction of the general subject of litigation, he has power, aside from the statute, to order such undertaking, or to make any other order in the progress of the case, for the furtherance of the objects of the litigation and the protection of its subject matter. *Prader v. Purkett*, 13 Cal. 588.

3. The usual bond being given, an order was made to show cause (Aug. 29th) why an injunction should not issue. A restraining order, in the "mean time," issued. The case was continued until October 10th, when, on hearing, the order was dissolved, injunction denied and suit dismissed. Action on the bond: Held, that the restraining order embraces the time between its issuance and the hearing, and that damages may be had beyond August 29th. *Id.*

4. Injunctions to restrain injuries in the nature of waste should not be issued before the hearing on the merits, except in cases of urgent necessity, or when the subject matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. But in all cases where the right is doubtful, the Court should direct a trial at law, and in the meantime grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief. *Hicks v. Michael*, 15 Cal. 107.

5. Where, under the one hundred and sixteenth section of the Practice Act, an order is made to show cause why an injunction should not be granted, and restraining defendants until the hearing, and on the hearing upon the order the injunction is refused, the restraining order expired by limitation. *Id.*

6. An appeal from an order refusing to grant an injunction upon such hearing, or from an order dissolving an injunction, does not create an injunction or prolong the restraining order in the former case, nor revive it in the latter, pending the appeal. *Id.*

7. The object of the practice of issuing an order to show cause before granting the injunction, is to enable the parties to present the case on the merits. *Id.*

§ 117. *Injunction to suspend business of a corporation—how and by whom granted.*

An injunction to suspend the general and ordinary business of a corporation shall not be granted except by the Court or a Judge thereof; nor shall it be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the people of this State are a party to the proceeding.

¹Amended 1886, 703. N. Y. Code; § 234.

1. A Court of equity has no jurisdiction over corporations, for the purpose of restraining their operations or winding up their concerns. Such Court may compel the officers of the corporation to account for any breach of trust, but the jurisdiction for this purpose is over the officers personally, and not over the corporation. *Neall v. Hill*, 16 Cal. 145.

§ 118. *Motion to vacate or modify injunction.*

If an injunction be granted without notice, the defendant, at any time before the trial may apply upon reasonable notice to the Judge who granted the injunction, or to the Court in which the action is brought, to dissolve or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted, or upon affidavit on the part of the defendant, with or without the answer. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other evidence, in addition to those on which the injunction was granted.

N. Y. Code, § 225. Abb. Forms, 1450.

1. Motion, in what court to be made.—The Court in which the objectionable order or decree exists, is the one to apply to for relief. *Chigmes v. Hubbard*, 8 Cal. 268.

2. Section three hundred and thirty-four of the Practice Act provides that an order made out of Court, without notice to the adverse party, may be vacated or modified without notice. The provision made in section one hundred and eighteen, that if an injunction be granted without notice, the defendant, at any time before trial, may apply, upon reasonable notice, to dissolve or modify the same, is not a substitution for the power conferred by section three hundred and thirty-four, but in addition to it. Where an order granting an injunction is made *ex parte*, the injunction may be dissolved without notice. *Borland v. Thornton*, 12 Cal. 440.

3. The right to move to dissolve an injunction before final hearing exists only where it was granted without notice, according to section one hundred and eighteen of the Practice Act. *Natoma Water and Mining Co. v. Parker*, 16 Cal. 83.

4. If the injunction has been granted without notice to the defendant, he may move to dissolve, *first*, upon the complaint and affidavits, or, in other words, the papers, whatever they may have been, upon which the injunction was granted; or, *second*, upon the papers upon which the injunction was granted and affidavits on the part of defendant, with or without answer. If the defendant rests his motion upon the papers upon which the injunction is granted, the plaintiff can make no further showing, but must stand upon his complaint, or his complaint and affidavits, as the case may be. If, however, the defendant makes a counter showing by affidavit, with or without the answer, the plaintiff may meet it with a further showing on his part. If the defendant moves upon what he has prepared as his verified answer, he makes it an affidavit in the sense of the statute for all the purposes of his motion, and he cannot deprive the plaintiff of his right to reply, by calling it an answer instead of an affidavit. *Falkinburgh et al. v. Lucy et al.*, April T. 1868.

5. Motion on complaint and answer.—Where a motion to dissolve an injunction is made upon bill and answer alone, the general rule is to dissolve the injunction, if the answer denies all the equities of the bill. There are exceptions to the rule, but they depend upon the special circumstances of the particular cases. *Gardiner v. Perkins*, 9 Cal. 553.

6. The entire equity of the bill in this case being denied in the answer, and there being no support of the bill, the injunction was dissolved. *Burnett v. Whitesides*, 13 Cal. 156.

7. Where an injunction was granted on the complaint, restraining defendants from surveying or selling the premises pending suit, it was dissolved on filing an answer setting up paramount title in defendants: *Held*, that the injunction was properly dissolved, because the validity of defendants' title should be judicially determined before its assertion be enjoined. *Curtis v. Butler*, 15 Cal. 263.

8. Where a motion to dissolve an injunction is heard upon the pleadings alone, it should be granted if the answer denies all the material allegations of complaint. *Johnson v. Wide West M. Co.*, 22 Cal. 479.

9. Where an injunction is granted without notice, upon the filing of a complaint, and an answer is afterwards filed denying all the equities of the complaint, the injunction will be dissolved on motion. *Real del Monte Co. v. Pond Co.*, 23 Cal. 82.

10. Affidavits contradicting answer.—On application for injunction to restrain waste, or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all matters in controversy, including questions of title. *Hicks v. Michael*, 15 Cal. 107.

11. Motion to dissolve limited.—The privilege of moving for a dissolution of an injunction upon the filing of an answer, is limited to cases where the injunction is originally granted without notice. *Henshaw v. Clark*, and one hundred and three *Chinamen*, 14 Cal. 460.

12. Where the injunction is granted on a rule to show cause, it cannot be dissolved until the final hearing, unless the right to apply for dissolution on filing the answer be expressly reserved. *Id.*

13. An injunction granted upon an order to show cause, and after a full hearing on the merits, cannot be dissolved on motion before the final hear-

ing. The only remedy is to appeal from the order granting the injunction. *Natoma Water & Mining Co. v. Parker*, 16 Cal. 83.

14. Special cases of dissolution of injunction.—Where an assessment was laid for the purpose of improving a street, thereby benefiting the property of the plaintiff in common with the property of other persons owning lots on the same street, and the improvement was completed without the plaintiff interposing in the outset to prevent it, and he then filed an injunction bill to stay the sale of his land by virtue of an ordinance of the city for the purpose of avoiding the payment of his portion of the assessment: *Held*, that the injunction ought to be dissolved, on the ground that he who asks equity must do equity; that the city should be permitted to proceed and sell the plaintiff's land for the purpose of satisfying the assessment, leaving him after the sale to the technical rights which he set up by reason, as he claimed, of some irregularity in the mode of making the assessment. *Weber v. The City of San Francisco*, 1 Cal. 455-119.

15. Plaintiffs sue defendants for damages for their alleged trespasses upon a certain portion of quartz mining claims, alleged in the complaint to be the property and in the possession of plaintiffs, asking an injunction against further trespasses, which was granted—the complaint averring the insolvency of defendants. The defendants deny all the allegations of the complaint, and claim ownership. The jury found, generally, "for defendants, then moved to amend the judgment by adding thereto the words, 'and that the injunction heretofore granted be, and the same is hereby dissolved,'" which was refused; but the judgment was so modified as to permit defendants to work the surface diggings set up in their answer. *Held*, that the action amounted to an action of trespass, with an injunction as auxiliary thereto; and that the action itself, having failed by the verdict for defendants, the injunction falls with it, and should have been dissolved. *Brewster v. Gaston*, 17 Cal. 372.

16. A reversal of a judgment, which judgment awards the plaintiff possession of a tract of land, and perpetually enjoins the defendant from committing waste on the land, also reverses the injunction decree, even if the decree is not included in the record sent to the Appellate Court. *McGarrahan v. Maxwell*, 28 Cal. 84.

17. When a preliminary injunction is granted on plaintiff's application, the injunction should be dissolved if a nonsuit is granted on the trial. *Harris v. McGregor*, 29 Cal. 124.

18. Where suit is brought to set aside a judgment on the ground of fraud, and a restraining order is issued in such suit at the instance of the plaintiff, and subsequently, at a final hearing, the Court decides that such judgment was not fraudulent, but valid: *Held*, that the effect of such judgment is that plaintiff was not entitled to the restraining order. *Hayman & Co. v. Landers*, 12 Cal. 107.

19. An appeal from an order, dissolving an injunction, does not prolong the restraining order. *Hicks v. Michael*, 15 Cal. 107.

20. An injunction is not dissolved or superseded by appeal taken. *Merced Mining Co. v. Fremont*, 7 Cal. 130.

21. Pendency of motion for a new trial does not operate as a suspension of an injunction. *Ortman v. Dixon*, 9 Cal. 23.

§ 119. When to be vacated or modified.

If upon such application it satisfactorily appear that there is not sufficient ground for the injunction, it shall be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it shall be modified.

See *ante*, § 118. Abb. Forms, 1450.

TITLE VIII.

OF THE ATTACHMENT REMEDIES IN CIVIL ACTIONS.

CHAPTER IV.—*Attachment.*

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§ 120. *Attachment, when and in what cases may issue.(a.)*

The plaintiff, at the time of issuing his summons, or at any time afterward, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay

(a) STATUTES OF 1867-8; page 212. Approved March 21st, 1868.

SECTION 2. In all cases of executions, attachments, and writs of a similar nature, hereafter to be issued against any person or persons, or chartered company, or corporation, it shall be lawful for such miners, mechanics, salesmen, servants, clerks and laborers, to give notice of the claim or claims, and the amount thereof, duly certified and sworn to by the creditor or creditors making the claim, to the officer executing either of such writs, at any time before the actual sale of property levied on; and such officers shall pay to such miners, mechanics, salesmen, servants, clerks or laborers, out of the proceeds of the sale, the amount each is justly and legally entitled to receive for services rendered, within the forty days next preceding the levy of the writ of execution, attachment or other writ, not exceeding one hundred dollars of gold coin of the United States; provided, if any or all of the claims so presented and claiming preference under this section shall be disputed by either the debtor or the creditor, the miner, mechanic, salesman, servant, clerk, or laborer,

such judgment, as hereinafter provided, in the following cases :

1st. In an action upon a contract, express or implied, for the direct payment of money, which contract is made or is payable in this State, and is not secured by a mortgage, lien, or pledge, upon real or personal property, or, if so secured, that such security has been rendered nugatory by the act of the defendant.

2d. In an action upon a contract, express or implied, against a defendant not residing in this State.

¹Amended 1853, 276 ; 1858, 152 ; 1860, 300.

1. Attachment, when may issue.—The process of attachment is a creation of statute, and is a remedy only given in cases of indebtedness arising upon contract. *Griswold v. Sharpe*, 2 Cal. 17.

2. The remedy by attachment is given by the statute of this State to those contracts for the direct payment of money which are made in or are payable in this State. *Dutton v. Shelton*, 3 Cal. 206.

3. The remedy by attachment is not a distinct proceeding in the nature of an action *in rem*, but is a proceeding auxiliary to an action at law designed to secure the payment of any judgment the plaintiff may obtain. *Low v. Adams*, 6 Cal. 277.

4. Where G. & Co., concealing their insolvency, obtained an extension from their creditor B., and before the maturity of the notes, B. apprehending that G. & Co. would fall before their paper became due, and that the other creditors of G. & Co. would exhaust their assets by attachment, obtained, by an arrangement with G. & Co., an ante-dated note for the amount due him at the date thereof by G. & Co., on which suit was commenced by attachment, and a levy made upon the property of G. & Co. *Held*, that B.'s attachment and claim was valid against the subsequent attaching creditors, the case not being one either of actual or constructive fraud. *Brewster v. Bours*, 8 Cal. 501.

5. Where an attachment was issued on a complaint, which was a printed form, with the blanks filled up by the clerk, at the request of plaintiff, but no name signed to it till next day, and after other attachment on the same property, when it was signed by the clerk, with the name of plaintiff's attorney: *Held*, that the action of the clerk, though not correct, was only an irregularity, and the complaint was not void. *Dacey v. Pollock*, 8 Cal. 570.

6. It is well settled that the proceedings by attachment are statutory and special, and must be strictly pursued, and when a party relies upon his attachment lien as a remedy, he must strictly follow the provisions of the attachment law. *Roberts & Co. v. Landecker*, 9 Cal. 262.

7. Where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, and other creditors, subsequently attaching, cannot complain that the suit was prematurely brought. *Patriot v. Montader*, 13 Cal. 434.

presenting the same, shall commence an action within ten days for the recovery thereof, and shall prosecute his action with due diligence, or be forever barred from any claim of priority of payment thereof; but, in case action is rendered necessary by the act, as aforesaid, or either debtor or creditor, and judgment shall be had for said claim, or any part thereof, carrying costs, the costs attending the prosecution of said action, and legally incurred therein, shall likewise be a preferred claim, with the same rank as the original claim; and provided further, if the amount of assets, after deducting costs of levy and sale, shall not be adequate to the payment of all of the preferred claims of this class, they shall be paid *pro rata* out of the fund hereby made applicable thereto; and provided further, that nothing in this Act contained shall be construed to affect any homestead claims, mortgages, or liens of any description, created and existing before the claim of such laborer accrued.

8. *Patrick v. Montader* (13 Cal. 434) goes upon the ground that the debt on which the attachment issued was *equitably due*, and hence, does not conflict with the rule laid down here. *Davis v. Eppinger*, 18 Cal. 378. See *post*, No. 29.

9. A writ of attachment is effectual to change the title of personal property only from the time of levy. *Tufts v. Marlowe*, 14 Cal. 47.

10. An attachment may be issued on a debt contracted at any time since the passage of the Practice Act, April 29th, 1851. *O'Connor v. Blake*, 29 Cal. 312.

11. The words "made after the passage of this Act," in the Act concerning attachments, are not limited to debts contracted after the amendment of the Act in 1860, but refer to the Act as passed in 1851. *Id.*

12. An attachment, regular upon its face, is not void because the complaint does not set up a cause of action which warrants the issuance of an attachment. *McComb v. Reed*, 28 Cal. 281.

13. An appeal bond is a contract for the direct payment of money within the meaning of section 120 of the Practice Act. *Hathaway v. Phillips*, Oct. T. 1867.

14. Attachment, when it cannot issue.—In an action to recover damage for collision, their being no indebtedness arising upon contract, an attachment cannot issue. *Griswold v. Sharpe*, 2 Cal. 24.

15. A debt due for merchandise sold in Boston to residents of San Francisco, and forwarded to the latter, they stipulating to pay by remitting funds to Boston, is not the subject of an attachment under the Act of the twenty-ninth of April, 1851. *Dutton v. Shelton*, 3 Cal. 206.

16. An attachment, issued before the issuance of the summons in the suit, is void, and the subsequent issuance of the summons cannot cure it. *Love v. Emery*, 9 Cal. 538.

17. Where two shareholders in a joint stock company sold to the company goods to a large amount, and afterwards, during the existence of the company, sold their stock to A., and assigned their account for such goods to B., who sold such company on said account by attachment: *Held*, that such action could not be maintained, there having been no final settlement of the partnership accounts, no balance struck, and no express promise on the part of the individual members to pay their ascertained portion. *Bullard v. Kinney*, 19 Cal. 60.

18. The indebtedness of a maker upon a promissory note, before its maturity, is not the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. *Gregory v. Hyatt*, 10 Cal. 339. Nor can such indebtedness, after the maturity of the note, be attached, unless the note is at the time in the possession of the defendant, from whom its delivery can be enforced on its payment upon the attachment. *Id.*

19. An attachment issued before the maturity of the debt is *prima facie* void against a subsequent attachment. *Patrick v. Montader*, 13 Cal. 434.

20. An attachment issued upon a debt not due, is void as against creditors whose rights are injuriously affected by it. *Davis v. Eppinger*, 18 Cal. 378. See *ante*, No. 8.

21. If the plaintiff has a vendor's lien to secure his debt on real property out of this State, an attachment cannot issue. *Hill v. Grigsby*, 32 Cal. 55.

22. The vendor of real estate cannot take out an attachment for unpaid purchase money, if he can enforce a lien for such purchase money. It matters not whether such lien is one which Courts of equity will enforce in favor of a vendor, or whether it is one created by contract. *Id.* See *Porter v. Smith*, April T. 1868.

23. An attachment cannot issue when the plaintiff has a lien to secure his debt, and it matters not whether the lien is one recognized by Courts of equity, or is one of statutory origin and resting in contract. *Id.*

24. By and against partners.—Where one partner buys out his co-partners, agreeing to pay the debts of the firm, the partnership remains bound for firm debts just as before the sale. The lien of firm creditors attaching must be

preferred to the lien of an individual creditor of the remaining partner attaching first. *Conroy v. Woods*, 13 Cal. 626.

25. The filing of a bill by one partner against his copartners for a dissolution and account, and praying for an injunction and receiver, and an appointment of a receiver by the Court, does not prevent a creditor from proceeding by attachment and gaining a priority over other creditors, until a final decree of dissolution and order of distribution. *Adams v. Woods & Haskell, T. A. Lynch et al., Intervenor*, 9 Cal. 24.

26. **Tenant in common.**—A sheriff having an attachment against V., may levy on his interest in the grain; and to effect this, may take and retain possession of the entire quantity of grain; but he can sell under the execution on the judgment that may be recovered in the action only the undivided one-third interest of V., the purchaser at the sale becoming tenant in common with B. *Bernal v. Hovious*, 17 Cal. 541.

27. **Creditor's bill.**—A lien by attachment enables a creditor to file a creditor's bill without waiting for judgment and execution. *Conroy v. Woods*, 13 Cal. 626.

28. Where two attachments have been levied on the same property, can the junior attaching creditor successfully attack the validity of the first, on the ground that the complaint did not contain a cause of action upon a contract, express or implied, for the direct payment of money? *McComb v. Reed*, 26 Cal. 281.

29. **Judgment.**—The judgment in an attachment suit need not direct the sale of the property attached, as the law makes it the duty of the sheriff to sell it. *Low v. Henry*, 9 Cal. 538.

30. Unless the answer of a garnishee discloses liens having priority of claim upon the funds in his hands, judgment must be rendered for the amount he admits is due. *Cahoon v. Levy*, 4 Cal. 244.

31. When the attachment will not lie and will be discharged, see § 138.

32. **Priority of attachments.**—Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that by his superior diligence the fraud has been discovered. *Patrick v. Montader*, 13 Cal. 434.

33. Such a fund is not strictly an equitable asset. The prior attachments became liens in the nature of a legal estate vested in the sheriff for the benefit of the creditors. Plaintiff's costs, disbursements and counsel fees, however, should first be deducted from the fund before distribution. *Id.*

34. The debt in such case is equitably due, and there being no actual fraud against subsequent creditors, they cannot be preferred in equity, even if the suit could have been defeated by the debtor himself. *Id.*

35. Action commenced by attachment to recover an alleged indebtedness, and defendants made default; before the entry of judgment, certain subsequent attaching creditors intervened and contested the validity of the plaintiff's attachment, on the ground that no debt was really due from plaintiff to defendant. On the issue thus raised, the Court found in favor of the intervenors, and thereupon entered an order setting aside the attachment of plaintiff. *Held*, that the order was erroneous in entirely setting aside the plaintiff's attachment, and must be modified so as merely to postpone the plaintiff's lien to that of the intervenors. *Speyer v. Ihmels*, 21 Cal. 280.

36. **Clerk, to issue attachments in a certain order.**—It is the duty of the clerks of the District Courts to issue and deliver to the parties respectively or to their attorneys, writs of attachment in the order in which the preliminary papers are presented to them, and the writs demanded. *Lick v. Madder*, 25 Cal. 205.

37. **Right of stoppage is paramount to an attachment lien.**—This right of stoppage in transitu is paramount to any lien on the goods claimed by third persons through the purchaser, and may be exercised to defeat an at-

achment or execution levied upon the goods by a creditor of the vendee. *Blackman v. Pierce*, 23 Cal. 508.

§ 121. *Affidavit for attachment, what to contain.*

The Clerk of the Court shall issue the writ of attachment upon receiving an affidavit by, or on behalf of the plaintiff, which shall be filed, showing :

1st. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness, over and above all legal set-offs or counter claims), upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this State, and that the payment of the same has not been secured by any mortgage, lien, or pledge, upon real and personal property : or,

2d. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness as near as may be, over and above all legal set-offs or counter claims), and that the defendant is a non-resident of the State : and,

3d. That the sum for which the attachment is asked is an actual *bona fide* existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud, any creditor or creditors of the defendant.

¹ Amended, 1853, 277; 1858, 153; 1860, 301. Bancroft's Forms, 496-499; Abb. Forms, 1367-1374; Clerk to indorse the affidavit. See Rule XLII for San Francisco.

1. The fact that an affidavit for an attachment omits to aver that the sum for which the writ is asked is "an actual *bona fide* existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor or creditors of the debtor," does not render the attachment issued a nullity as against subsequent attaching creditors. *Fridenberg v. Pierson*, 18 Cal. 152.

2. A junior attaching creditor cannot take advantage of irregularities in the affidavit or bond given by a prior attaching creditor of a common debtor. *Id.*

3. An affidavit for attachment is insufficient, which avers that the defendant is indebted to the plaintiff upon an express or implied contract. *Hawley v. Debus*, 4 Cal. 195.

4. A pledge of personal property is a "mortgage," within the meaning of the Attachment Act, the word being there used in its most general significance, meaning "security." *Payne v. Bensley*, 8 Cal. 260.

§ 122. *Undertaking on attachment.*

Before issuing the writ, the clerk shall require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars,¹ not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that if

the defendant receiver judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

¹Amended, 1858, 1531; 1860, 301. See § 656. See *ant*, § 76, note (a) and (b). Bancroft's Forms, 501-504-1375.

²Amount of undertaking. See Rule XXXVIII for San Francisco. To be indorsed—the hour and minute—Rule XLII.

1. An attachment bond, executed after the writ has been levied and the attachment dismissed, is void. *Benedict v. Bray*, 2 Cal. 251.

2. In attachment, the undertaking should precede the writ and accompany the affidavit. *Id.*

3. It is no objection to an undertaking on attachment that it is made payable to the People of the State of California, instead of the defendant in the suit, as the latter can sue thereon in his own name. *Tuaffe v. Rosenthal*, 7 Cal. 514.

4. A mistake in the recital of the bond as to the amount for which attachment issued, may be explained and corrected by parol. *Palmer v. Vance*, 13 Cal. 556.

5. Action on the bond.—In an action on a bond given on suing out an attachment against the property of a debtor, who was a merchant, where the sheriff had levied on no property except real estate: *Held*, that evidence as to the general effect of an attachment upon the credit and reputation of merchants ought not to have been submitted to the jury, on the ground that damages resulting therefrom are too remote and contingent: and, *Held further*, that counsel fees paid by the attachment debtor in the defense of the suit commenced by the writ of attachment, over and above the taxable costs, were not recoverable, and that the District Judge erred in refusing, when requested, to instruct the jury to that effect, after having admitted evidence of the amount of such counsel fees. *Heath v. Lent*, 1 Cal. 410.

6. It seems that a verdict for \$3,000, in a suit on an attachment bond, where no property has been levied on under the writ of attachment except real estate, in the possession of which the debtor has not been disturbed, will be deemed excessive, and reversed on that ground. *Id.*

7. In an action on an attachment bond, it is improper to admit evidence of depreciation in value of real estate attached.—*Per Hastings, C. J.* *Id.*

8. In a suit on an attachment bond, if the bond is void, the obligors cannot recover for injury sustained by the attachment. *Benedict v. Bray*, 2 Cal. 251.

9. No recovery can be had on a bond purporting to be the joint bond of the principal and sureties, but signed by the latter only. *City of Sacramento v. Dunlap*, 14 Cal. 421.

10. Otherwise, as to undertakings under our system. They are original and independent contracts on the part of the sureties, and do not require the signature of the principal. *Id.*

11. Otherwise, also, as to joint and several bonds. There each signer is bound without the signatures of the others named as obligors, unless at the time of executing the bond he declared he would not be bound without such signatures were obtained. *Id.*

12. The recitals in statutory undertakings have the same effect and are to be construed in the same way as the bonds making the same recitals, and are conclusive of the facts stated. *McMillan v. Dana*, 18 Cal. 339. See Complaint, § 39, No. 334.

13. Duress of goods.—The issue of an attachment, and a levy of the same on goods, if there is a legal cause of action existing, is not such a duress of goods as to give a cause of action for damages in favor of the one whose goods are seized. *Kohler v. Wells, Fargo & Co.*, 26 Cal. 607.

§ 123. *¹ Writ, to whom and what to state.*

The writ shall be directed to the sheriff of any county in which property of such defendant may be, and require him to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, or in any amount equal to the value of the property which has been, or is about to be, attached; in which case, to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties.

¹Amended 1860, 315; See § 650; Bancroft's Forms, 507, 513; Abb. Forms, 1376.

§ 124. *Shares of stock and debts due defendant may be attached and sold.*

The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profit thereon, and all debts due such defendant, and all other property in this State of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution.

[Sections 124 to 141, inclusive, made applicable to Justices' Courts; see post, § 556.]

1. Funds in the hands of a receiver, appointed by a competent Court, are not liable to attachment. *Adams v. Haskell*, 6 Cal. 113; *Yuba County v. Adams*, 7 Cal. 35.

2. Where an attachment was issued by the Court of first instance against the property of a debtor, and the sheriff had executed the same, and was ordered to make the amount due the creditor out of the goods, chattels and property of the debtor: *Held*, that the sheriff could not maintain an action in his own name to recover a sum owing to the attachment debtor by a third person, for goods sold and delivered. *Sublette v. Melhado*, 1 Cal. 104.

§ 125. *Writ, how executed.*

The sheriff to whom the writ is directed and delivered, shall execute the same without delay, and if the undertaking mentioned in section one hundred and twenty-three be not given, as follows:

1st. Real property standing upon the records of the county, in the name of the defendant, shall be attached, by leaving a

copy of the writ with an occupant thereof; or, if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached with the recorder of the county.

2d. Real property, or any interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, shall be attached by leaving with such person, or his agent, a copy of the writ, and a notice that such real property, (giving a description thereof), and any interest therein, belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county, and leaving a copy of such writ and notice with an occupant of such property, or, if there be no occupant, by posting a copy thereof in a conspicuous place thereon.

3d. Personal property, capable of manual delivery, shall be attached, by taking it into custody.

4th. Stock, or shares or interest in stock, or shares of any corporation or company, shall be attached, by leaving with the president, or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ.

5th. Debits and credits, and other personal property, not capable of manual delivery, shall be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, on the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ.

¹Amended 1862, 568. Property, what may be attached, see post, § 217.

1. Writ, how executed, return.

2. Where a substitute sheriff (Elisor) was appointed, and the pleadings did not show that there was no sheriff or coroner, or that these officers were disqualified: *Held*, that the appointment being made by a Judge having competent jurisdiction, the presumption of the law is that he faithfully performed his duty. *Turner v. Billagram*, 2 Cal. 520.

3. The assent of an ordinary agent, who had general charge of his principal's affairs during her temporary absence, will not justify the sheriff, who

holds an execution against a third person, in levying it upon property in the possession of the principal in her absence. *Fitch v. Brockman*, 2 Cal. 575.

4. The return on an attachment cannot be amended so as to postpone the rights of creditors attaching subsequently, but before the collection. *Webster v. Hasworth*, 8 Cal. 21.

5. The presumptions are in favor of the regularity of the acts of the officer, and a return which simply states that the property was attached, is sufficient *prima facie* to show a due and proper execution of the writ. *Ritter v. Scannell*, 11 Cal. 248.

6. Our statute prescribes the manner in which real estate may be attached, but contains no express provision requiring that all the acts necessary to a valid levy shall be set out in the return; nor can such a rule be sustained. *Id.*

7. Nor is it necessary, when the levy is made by posting a copy of the writ on the premises, that the return of the sheriff should show that the premises were at the time unoccupied. *Id.*

8. No parol instruction of the plaintiff in an attachment or execution, respecting property seized by the sheriff under either writ, will discharge such sheriff from liability. The statute is express that such instruction must be in writing. *Sandford v. Boring*, 12 Cal. 539.

9. A sheriff who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands, except in the course of law, and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt. *Id.*

10. Where one writ of attachment was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the writ at one o'clock Monday morning, the sheriff was not guilty of negligence in executing the first—no special circumstances being shown. *Whitney v. Butterfield*, 13 Cal. 335.

11. Reasonable diligence in the execution of process depends upon the particular facts; whether, for instance, the writ be for fraud, or because the defendant is about to leave the State, or remove his property, and the like. *Id.*

12. The mere omission of a deputy to inform the sheriff of having a process in hand is not such negligence as to charge the sheriff, in case a writ last in hand was executed first. *Id.*

13. Where an officer, by virtue of a second attachment, levies on property already in his possession by virtue of a former attachment, it is only necessary for him to return that he has attached the interest of the defendant in the property then in his possession. *O'Conner v. Blake*, 29 Cal. 312.

14. A garnishment served upon the owner, in a suit against the head contractor after the commencement of the building, and before notice served, must prevail over the lien of a sub-contractor. *Cahoon v. Levy*, 6 Cal. 295.

15. The lien of an attachment having become fixed upon funds in the hands of a receiver, follows the property in the hands of his successors. *Adams v. Woods*, 9 Cal. 29.

16. T. commenced suit against J. by attachment; the writ was levied upon certain personal property by the plaintiff H., as sheriff. M. J., wife of J., claimed the property as a sole trader, and brought her action of replevin for the property, and obtained possession of the same, by the delivery of an undertaking as required by section one hundred and two of the Code. The undertaking was executed by defendants R. and S. The replevin suit was decided February 5th, 1855, in favor of H. T. obtained judgment in the attachment suit against J., November 30th, 1854. On the 18th of February, 1855, executions in favor of other creditors of J. coming into the hand of H., as sheriff, he levied thereon on the same property, and subsequently sold the property and paid the proceeds into Court. H. then brought this suit against the sureties in the replevin bond. *Held*, that the lien of T.'s attachment continued after the replevin of the goods by M. J. *Hunt v. Robinson*, 11 Cal. 262.

17. The deposit in the Recorder's office of a copy of the writ, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. *Ritter v. Scannell*, 11 Cal. 283.

18. Such lien cannot be divested by the failure of the sheriff to make a proper return of the writ. *Id.*

19. The lien of an attaching creditor of real estate takes effect immediately upon the levy of the attachment and the deposit of a copy of the writ, together with a description of the land attached, with the County Recorder. *Ritter v. Scannell*, 11 Cal. 238.

20. Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that by his superior diligence the fraud had been discovered. The prior attachments became liens in the nature of a legal estate vested in the sheriff for the benefit of the creditors. *Patrick v. Montader*, 13 Cal. 444.

21. The lien of firm creditors must be preferred to the lien of an individual creditor of the remaining partner attaching first. *Conroy v. Woods*, 13 Cal. 631.

22. A lien by attachment enables a creditor to file a creditor's bill, without waiting for judgment and execution. *Conroy v. Woods*, 13 Cal. 626.

23. Plaintiff, January 10th, 1858, in a suit entitled O. and M. and others, composing the Wisconsin Quartz Mining Co. (a corporation), attached a quartz mill and ledge belonging to the corporation. June 26th, 1858, the complaint was amended, so as to make the corporation, as such, the party defendant, and judgment was rendered against the company August 14th, 1858, the property sold and plaintiff the purchaser. October, 1857, W. received from the corporation a chattel mortgage on this property, had decree of foreclosure August 9th, 1858. Sale October following—W. the purchaser. Defendants here are in possession under sheriff's sale on the decree. Plaintiff claims title under his judgment and sale. *Held*, that he cannot recover; that he acquired no lien by the attachment, because the property attached belonged to the corporation, which was not a party to the suit until after the levy and return of the writ; that plaintiff's rights attach only from the date of his judgment, August 14th, 1858, and his lien being subsequent to the lien of W.'s judgment, August 9th, 1858, under which defendants' claim, the latter have the better right. *Collins v. Montgomery*, 16 Cal. 398.

24. The lien of attachment of real property is not perfected until both the acts prescribed by statute, to wit, delivery to the occupant of a copy of the writ, or posting a copy upon the premises if there be no occupant, and the filing of a copy with the recorder, together with a description of the property attached, are performed. The omission of either act is fatal to the creation of the lien. *Wheaton v. Neville*, 19 Cal. 41.

25. Where a writ of attachment was issued on the twenty-sixth of August, and a copy delivered to the occupant of the premises, or posted upon them, on the twenty-ninth of that month, and on the same day the writ was returned, with a certificate of the sheriff's proceedings, and filed in the clerk's office; but no copy of the writ, with a description of the property, was filed with the recorder until the ninth of September following: *Held*, that after the return of the writ to the clerk's office, on the twenty-ninth of August, the sheriff had no authority to take any proceedings for the completion of the attachment, previously omitted; that the writ was authority to him only for acts performed while it remained in his possession; and hence, that another creditor of the debtor purchasing the property from the latter, on the sixth of September, took it free from any lien of the attachment. *Id.*

26. It is the duty of an officer, after he has once entered upon the execution of an attachment, to complete its execution with diligence. *Id.*

§ 126. Attorney to give written instructions to sheriff what to attach

Upon receiving information in writing from the plaintiff, or his attorney, that any person has in his possession, or under his control, any credits or other personal property, belonging

to the defendant, or is owing any debt to the defendant, the sheriff shall serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ.

§ 127. *Garnishment, when garnishee liable to plaintiff.*

All persons having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff, for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied.

1. The liability of a garnishee dates from the service of the attachment and affidavit, and from the notice to appear. *Johnson v. Curry*, 2 Cal. 33.

2. The doctrine of garnishment, although partially regulated by statute, is not the less a common law proceeding, and therefore in proceedings against a garnishee, the parties are entitled to a jury trial. *Cahoon v. Levy*, 5 Cal. 294.

3. The lien of a sub-contractor filed, and notice given to the owner of a building, within thirty days after the completion of the work, under the Act of 1855, attaches from the time the work was commenced, and takes precedence over a garnishment served on the owner against the head contractor, after the work was commenced, and before the filing and serving notice of lien. *Tuttle v. Montford*, 7 Cal. 358.

4. The ex-sheriff could only be garnisheed as a private individual. *Graham v. Endicott*, 7 Cal. 144.

5. Where A., who carried on a printing office, and was indebted to the hands of the office, placed in the hands of B. a certain amount of money, with directions to B. to pay the hands, which B. neglected to do, and where there was no evidence showing that the hands agreed to look to B. for their money, or that A. was indebted to the hands in an amount equal or approximate to the sum in B.'s hands, and the money was subsequently attached in the hands of B. at the suit of C. against A.: *Held*, that the money was liable to the attachment. *Chandler v. Booth*, 11 Cal. 342.

6. The fact that the defendant in an action for the recovery of money has been garnisheed by a creditor of the plaintiff, constitutes no defense to the action, and cannot be set up in the answer as a plea in bar. The remedy of defendant in such case is by motion, based upon affidavit of the fact, for stay of proceedings until the action against the plaintiff or the attachment therein is disposed of. *McKeon v. McDermott*, 22 Cal. 667; *Pierson v. McCahill*, 21 Id. 123.

7. Money deposited with the sheriff by a defendant to procure the release of an attachment is in the custody of the law, but when the parties, by a mutual agreement, take it out of the hands of the sheriff, without any order or permission of Court, and loan it out to third parties, these parties are not the bailees of the sheriff, and the money ceases to be in the custody of the law, and can only be reached on proceedings supplementary to execution, in the same manner as other debts are reached. *Hathaway v. Brady*, 26 Cal. 586.

8. The defendant some time previous to the suit of the plaintiff against the R. S. Mining Co., sued the company and obtained judgment against it by de-

fault. The judgment was made to draw a certain rate of interest, without there being any prayer for such relief in the complaint. It was also erroneous in certain other respects. On appeal to the Supreme Court the judgment was modified by striking out certain clauses, and in certain other respects. There was no stay of proceedings in the Court below, and before the decision of the case by the Supreme Court the defendant had taken out an execution, and caused the mining claims of the R. S. Mining Company to be sold. At the sale the defendant bid the full sum for which his execution called, and became the purchaser. He paid the sheriff no money except his fees on the execution, but gave him a receipt, as is usual in such cases, for a sum equal to the face of the execution, less the fees paid to the sheriff. The R. S. M. Company had ceased to work their mine prior to this sale. After the sale a contract was made between the defendant and the company, by which the latter agreed to work the mine during the time allowed for the redemption, and pay over the proceeds to the defendant, and the latter agreed to pay all the expenses of working, and to pay the company wages in any event, whether the mine should yield a profit or not. Under this contract the defendant received from the mine over and above expenses the sum of \$7,000 in gold dust. Plaintiff, as an attaching creditor of the R. S. Mining Company, brings suit against the defendant as garnishee. *Held*, that the case presented failed to make the defendant a debtor of the company within reach of plaintiff's attachment. *Johnson v. Lampton*, Oct. T. 1867.

9. The process of garnishment is a legal, not an equitable remedy, and only applies to cases where the legal, as distinguished from the equitable, relation of debtor and creditor exists between the defendant and the garnishee. *Cassey et al. v. God is with us Congregation*, Ap. T. 1868.

§ 128. ¹*Citation to garnishee to appear before a Court or Judge.*

Any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant, may be required to attend before the Court or Judge, or a referee appointed by the Court or Judge, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The Court or Judge may, after such examination, order personal property capable of manual delivery, to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon, or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

¹Amended 1855, § 97; Abb. Forms, 1380-1381.

1. An order requiring a garnishee to pay into Court the amount for which judgment has been rendered against him may be considered as improper. *Smith v. Brown*, 5 Cal. 118.

2. In proceedings against a garnishee, it is the duty of the Court simply to render judgment against the garnishee for the amount found due by him to the judgment debtor. *Brunagim v. Boucher*, 6 Cal. 16.

3. An order that the garnishee pay over the money into Court is improper. *Id.*

4. The provisions of the one hundred and twenty-eighth section were intended for the security of the plaintiff, and not to confer a privilege upon the

garnishee, and the plaintiff may or may not, at his election, require the garnishee to appear and answer on oath, and his liability will not be affected by the failure of the plaintiff to take such a step. *Roberts & Co. v. Landecker*, 9 Cal. 262.

5. **Assignment, and its effects.**—Where shares of stock in a corporation have been regularly transferred as security for a loan, the mortgagee is the only proper garnishee in a suit against the mortgagor, in order to attach his interest in the corporation. *Edwards v. Beugnot*, 7 Cal. 162.

6. In such a case, the corporation is no longer privy to the interest of the mortgagor, which is a mere equity in the hands of the mortgagee. *Id.*

7. After the delivery and presentation of an order, the debt due by the drawee cannot be reached on attachment issued by the creditors of the drawer. As against any attempt by them to enforce its payment upon any such proceeding, the order is an effectual protection, as it is also against the suit of the assignor to collect the amount, unless such suit is prosecuted for the benefit of the assignee. *Wheatley v. Strobe*, 12 Cal. 92.

8. Plaintiff delivered to defendants gold dust, to be by them forwarded to San Francisco, to be there coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and C. were two. While the dust was in the hands of defendants, C. sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt evidencing the sale. Defendants, after this, received coin made of the dust, and a creditor of C. attached the coin, by garnisheeing defendants. Defendants had no notice of the sale to plaintiff until the day after the attachment, when plaintiff demanded C.'s share of the coin. *Held*, that plaintiff was entitled to the coin; that the dust in defendants' hands was in the constructive possession of all the five owners, C. having no exclusive interest in any part until it was converted into coin, and divided among the owners; that C.'s right in the dust was a *chose in action*, which he could assign by order in favor of the purchaser or assignee, and after such order, neither C. nor his creditors could claim any right to the money; that the Statute of Frauds has no application to a case like this. *Walling v. Miller*, 15 Cal. 38.

9. A garnishment does not give the creditor precedence over assignees of the fund, when the assignment is prior to the service of the garnishment. *Id.*

10. **Generally.**—Where a garnishee, in discharge of a rule, answers on oath, that he was released by the plaintiff, and that the plaintiff had abandoned his examination, he should be discharged by the Court without further delay, unless his answer is controverted by the affidavit of the plaintiff. *Ogden v. Mills*, 3 Cal. 253.

11. And where a party is garnisheed to answer on a certain day, and appears, and the summoning party declines, or is not prepared to take his answer, and the term closes without any action on the garnishment, the summons is discontinued and the party discharged from liability to answer. *Id.*

12. A garnishee can only be required to answer as to his liability, to the debtor or defendant, at the time of the service of the garnishment. *Norris v. Burgoynes*, 4 Cal. 409.

13. A garnishee should be allowed to amend his answer, whenever it appears that he has committed a mistake or fallen into error, which could not reasonably have been avoided. *Smith v. Brown*, 5 Cal. 118.

14. Where B. was garnisheed in a suit against C., the day before he accepted an order drawn by A. in favor of C., but failed to inform C. thereof; and C., for a valuable consideration, sold the order, as indorsed, to D., an innocent purchaser: *Held*, that B., having made the order negotiable, and put the same in circulation, is estopped from setting up against it any antecedent matter, and is liable to D. for the full amount thereof. *Garwood v. Simpson*, 8 Cal. 101.

15. A plaintiff who has sued out an attachment, and given the necessary notice to a garnishee that the property in his hands is attached, and subsequently the garnishee fraudulently disposes of the property, has a right to waive his lien on the property and bring suit for the value of the property against the garnishee. *Roberts & Co. v. Landecker*, 9 Cal. 262.

16. A party placing money in the hands of another for the purpose of making a bet on an election, in the name of the bailee, but for the benefit of the bailor,

may retract the illegal act of making the bet, and does not forfeit the money by reason of the illegality of the purpose for which it was deposited. *Hardy v. Hunt*, 11 Cal. 343.

17. The bailor does not part with the ownership by allowing it to be used for his benefit, though in the name of another. The money in the hands of the agent remains as between him and the principal, the money of the principal. *Id.*

18. Nor can an attaching creditor of the bailee, levying on the money in the hands of a stakeholder, with whom it has been deposited by the bailee, claim that the bailor is estopped by having allowed the bailee to use the money in his own name, when the specific money was in question and could be distinguished. The creditor has not been misled by acts or declarations of the bailor, nor had he given credit to the bailee by reason thereof. *Id.*

19. The stakeholder being informed of the rights of the bailor, was bound to protect those rights by resisting, in some way, the proceedings against him as a garnishee, the bailor being no party thereto; nor will he be protected by a judgment improperly entered against him, ordering him to pay the money to the attachment creditor. *Id.*

20. A garnishee cannot plead the pendency of the attachment suit in abatement of an action subsequently brought against him by the debtor in the attachment. Nor can he safely pay his creditor, the debtor in the attachment, so long as proceedings by attachment are in force. The proper course is for the Court to order a suspension of the action against the garnishee by his creditor, until the attachment proceedings are disposed of. *McFadden v. O'Donnell*, 18 Cal. 160; 23 Cal. 122; 13 Cal. 667.

§ 129. *Inventory; how made, etc.*

The sheriff shall make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached, he shall request, at the time of service, the party owing the debt, or having the credit, to give him a memorandum stating the amount and description of each; and if such memorandum be refused, he shall return the fact of refusal with the writ. The party refusing to give the memorandum may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amounts and description of such debt or credit.

Abb. Forms, 1378.

§ 130. *Perishable property; how sold, etc.*

If any of the property attached be perishable, the sheriff shall sell the same in the manner in which such property is sold on execution. The proceeds, and other property attached by him, shall be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment. Debts and credits attached may be collected by him, if the same can be done

without suit. The sheriff's receipt shall be a sufficient discharge for the amount paid.

1. No order of Court is required to authorize a sale by the officer. *Low v. Hery*, 9 Cal. 551.

2. See post, § 654, as to the practice.

§ 131. *Proceedings where property is claimed by third persons.*

If any personal property attached be claimed by a third person as his property, the sheriff may summon a jury of six men to try the validity of such claim; and such proceedings shall be had thereon, with the like effect, as in case of a claim after levy upon execution.

See § 218 as to the law and practice.

1. Where property attached is claimed by a third person, the sheriff may protect himself before a jury of six persons, and if the verdict be in favor of the claimant, he may relinquish the levy, unless indemnified. If he gives the bond of the indemnity, it will only enure to the benefit of the owner of the property, so far as the consequences which result from his own acts are concerned. *Davidson v. Dallas*, 8 Cal. 227.

2. In such case, the attaching creditors do not stand in the position of joint trespassers, the seizure of the second being subject to the first. *Id.*

3. The admission that the property is attached or levied upon as the property of the debtor, and the promise of the owner to deliver it to the officer constitute *prima facie* evidence of ownership in the debtor, and unless overcome by proof on the part of the claimant, must be decisive against him. *Heven v. Freer*, 10 Cal. 172.

4. To overcome this *prima facie* ownership in the debtor, the receptor must prove two things: first, that he claimed the property; second, that it was in fact his own. *Id.*

5. Where property has been wrongfully taken under attachment, the sheriff and the attaching creditors are joint trespassers. *Lewis v. Johns et al.*, Jan. T. 1898.

§ 132. *If plaintiff recover judgment, how satisfied.*

If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the property attached by him which has not been delivered to the defendant, or a claimant as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

1st. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment:

2d. If any balance remain due, and an execution shall have been issued on the judgment, he shall sell under the execu-

tion so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales shall be given, and the sales conducted as in other cases of sales on execution.

1. The application of an attaching creditor to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given, by the party moving, to the other attaching creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them. *Dacey v. Pollock*, 8 Cal. 570.

§ 133. *Balance remaining due, how collected.*

If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff shall proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

§ 134. *When an action may be commenced on the undertaking.*

If the execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section one hundred and twenty-three or section one hundred and thirty-seven, or he may proceed as in other cases upon the return of an execution.

1. The undertaking only operated to release the property from the custody of the sheriff pending the suit, and not as an actual substitution of security. *Low v. Adams*, 6 Cal. 277.

§ 135. *If the defendant recover judgment, what the sheriff is to deliver.*

If the defendant recover judgment against the plaintiff any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, shall be delivered to the defendant or his agent; the order of attachment shall be discharged, and the property released therefrom.

§ 136. *Proceedings to release attachment, before whom taken.*

Whenever the defendant shall have appeared in the

action, he may, upon reasonable notice to the plaintiff, apply to the Court in which the action is pending, or to the Judge thereof, or to a County Judge, for an order to discharge the attachment wholly or in part, and upon the execution of the undertaking mentioned in the next section, such order may be granted, releasing from the operation of the attachment any or all of the property attached, and all of the property so released, and all of the proceeds of the sales thereof, be delivered to the defendant, upon the justification of the sureties on the undertaking, if required by the plaintiff.

Amended 1854, 87; 1863, 305. Abb. Forms, 1382-1383.

§ 137. *Attachment, in what cases it may be released, and upon what terms.*

Before the granting such order, the Court or Judge shall require an undertaking on behalf of the defendant, by at least two sureties, residents and freeholders or householders in the county, to the effect that in case the plaintiff recover judgment in the action, defendant will, on demand, redeliver such attached property so released, to the proper officer, to be applied to the payment of the judgment, and that in default thereof the defendant and sureties will on demand pay to the plaintiff the full value of the property released. The Court or Judge granting such release may fix the sum for which the undertaking shall be executed, and if necessary in fixing such sum to know the value of the property released, the same may be appraised by three disinterested persons to be appointed for that purpose. The sureties may be required to justify before the Court or Judge, and the property attached shall not be released from the attachment without their justification, if the same be required.

¹Amended 1854, 87; 1864, 44; Abb. F. 1385. State officers, etc., not required to give a bond—see note (b), § 76.

1. The bond given to release property attached only releases it from the custody of the sheriff, and is not an actual substitution of security, compelling the plaintiff to proceed upon the bond alone to collect his judgment. *Low v. Adams*, 6 Cal. 277.

2. In an action on this undertaking, the complaint should allege that the property attached was released upon the delivery of the undertaking. *Wickhamson v. Blatten*, 9 Cal. 500.

3. Whether each obligor is liable to the sheriff for the whole amount of any judgment against him, leaving the question of contribution to be settled between them: *Query*. *White v. Frost*, 13 Cal. 521.

4. In a bond given to release property seized on an attachment, the obligors undertook to pay, on demand, to plaintiffs in the action, the amount of the judgment and costs, not to exceed three thousand dollars, which plaintiff might recover. In the bond the action is recited as for one thousand six hundred dollars. Upon delivery of the bond, the property was returned to the debtor. Plaintiffs in the action had judgment for an amount exceeding the penalty of the bond. *Held*, that recovery may be had on the bond to the extent of the penalty. *Palmer v. Vance*, 13 Cal. 553.

5. Such a bond is not a statutory undertaking, but is valid as a common law obligation, and is a sufficient compliance with the statute. *Id.*

6. The mistake in the recital, as to the amount for which attachment issued, may be explained and corrected by parol. *Id.*

7. Execution against the judgment debtor, in such case, is not a condition precedent to suit on the bond. *Id.*

8. A bond given voluntarily to the sheriff, on delivery of the property, is valid at common law. *Id.*

9. Where the sheriff, under a writ of attachment in the suit of plaintiff against D. M. Eder and P. M. Eder, as the firm of D. M. Eder & Co., is about to levy upon the property of said firm, and a bond is executed by L. and J., as sureties, conditioned to keep harmless and indemnify the sheriff against all damages, costs, charges, trouble and expense he may be put to by reason of the nonseizure of the property, and also "to pay whatever judgment may be rendered against said defendants;" and judgment was obtained against one only of the defendants, plaintiff failing on the trial to prove the other to be a partner: *Held*, that the sureties are liable on the bond for the amount of the judgment; that the bond, though not strictly an undertaking under the statute, conforms substantially to its requirements, and must be read by the light of the statute, and interpreted according to the intention of the parties. *Reynemann v. Eder*, 17 Cal. 433.

10. Such bond will be presumed to have been executed with reference to the provisions of the statute; and as the security required by the statute is a security for the satisfaction of any judgment that may be obtained, the bond will be held to be such a security. This is the sense of the instrument, and the fact that judgment was obtained against one only of the defendants satisfies the condition to "pay whatever judgment may be rendered against said defendants." *Id.*

11. Where defendant in attachment applies to the Court, under sections one hundred and thirty-six and one hundred and thirty-seven of the Practice Act, for a discharge of the attachment, and an undertaking is executed by D. and R., reciting the fact of the attachment, and that "in consideration of the premises, and in consideration of the release from attachment of the property attached as above mentioned," they undertake to pay whatever judgment plaintiff may recover, etc., and the Court makes an order discharging the writ and releasing the property: *Held*, in suit against the sureties on the undertaking, that the complaint need not aver that the property was actually released and delivered to the defendant; that as the consideration for the undertaking was the release of the property, and as the complaint avers such release, in consequence and in consideration of the undertaking, by order of the Court, which is set out, the actual release and redelivery of the property to defendant is immaterial, the plaintiff having no claim on it after the undertaking was given and the order of release made. *McMillan v. Dana*, 18 Cal. 389.

12. An undertaking given to a sheriff to procure a lease of goods attached, is for the benefit of the plaintiff who may sue on it, and if the sheriff takes a sufficient statutory undertaking he has no further responsibility. *Curtis v. Packard*, 29 Cal. 194.

13. If the defendant obtains an order for the release of property attached in the action by delivering to the Court or Judge an undertaking executed, by sureties, conditioned to pay the plaintiff any judgment he may recover in the action, and the property is thereupon released: whenever the liability of the

sureties is fixed by the rendition of a judgment in favor of the plaintiff, the sureties have a right to tender the plaintiff the full amount of the judgment, and if he refuses to receive the same, the sureties are discharged from their obligation on the undertaking. *Hoyes v. Josephi*, 26 Cal. 540.

14. The principals in a bond given to a sheriff to release goods from attachment, tender to the plaintiff in the attachment suit the full amount of his debt and costs, and the plaintiff refuses to receive the tender; the sureties are discharged from their obligation on the bond, and for the purpose of discharging the sureties it is not necessary that such tender be paid into Court or kept good. *Curiae v. Packard*, 29 Cal. 194.

15. A tender of the amount claimed in the suit by the principal in an attachment bond discharges the sureties. *Id.*

16. Tender by sureties on undertaking for release of attachment to plaintiff in attachment suit of the full amount of judgment recovered is equivalent to payment or release by said plaintiff. *Norwood v. Kenfield*, Oct. T. 1887.

§ 138. ¹ *When a motion to discharge attachment may be made, and upon what grounds.*

The defendant may also, any time before the time for answering expires, apply, on motion, upon reasonable notice to the plaintiff, to the Court in which the action is brought, or to the Judge thereof, or to a County Judge, that the attachment be discharged, on the ground that the writ was improperly or irregularly issued.

¹Amended 1854, 87; 1858, 153; 1860, 301. Abb. Forms, 1382-1383.

1. The one hundred and thirty-eighth section of the Practice Act, which provides that the defendant may, at any time before answering, "apply, on motion, upon reasonable notice to the plaintiff, to the Court in which the action is brought, or to the Judge thereof, or to a County Judge, that the attachment be discharged, on the ground that the writ was improperly issued," does not obviate the necessity of specifying the particular points of irregularity upon which the motion will be made. *Freeborn, Goodwin, v. Glaser*, 10 Cal. 337.

2. A notice of motion to discharge a writ of attachment, "because the said writ was improperly issued," is insufficient. The notice should specify the grounds of the motion, and wherein it will be urged that the writ was improperly issued. *Id.*

3. See *ante*, § 120, for instances where an attachment ought not to issue. In such cases the attachment will be discharged.

§ 139. ¹ *When the motion is made on the affidavits, it may be opposed by affidavits.*

If the motion be made upon affidavits, on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

¹Amended 1858, 153; 1860, 301.

§ 140. *When the writ shall be discharged.*

If, upon such application, it shall satisfactorily appear that he writ of attachment was improperly or irregularly issued, it shall be discharged.

¹Amended 1858, 154; 1860, 302.

1. See § 120, *ante*, note, "*When attachment cannot issue.*"

2. Action commenced by attachment to recover an alleged indebtedness, and defendants made default; before the entry of judgment, certain subsequent attaching creditors intervened and contested the validity of the plaintiff's attachment, on the ground that no debt was really due from plaintiff to defendants. On the issue thus raised, the Court found in favor of the intervenors, and thereupon entered an order setting aside the attachment of plaintiff. *Held*, that the order was erroneous in entirely setting aside plaintiff's attachment, and must be modified so as merely to postpone the plaintiff's lien to that of the intervenors. *Speyer v. Daniels*, 21 Cal. 280.

3. If the defendant dies after the levy of an attachment upon his property and before judgment, his death destroys the lien of the attachment, and the attached property passes into the hands of the administrator to be administered on in due course of administration. *Meyers v. Mott*, 29 Cal. 359.

§ 141. *When the writ is to be returned. To what debts these sections apply.*

The sheriff shall return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon, or attached thereto. The provisions of this chapter shall not apply to any suits already commenced, but so far as such suits may be concerned, the Act entitled "An Act to regulate Proceedings against Debtors by Attachment," passed April 22d, 1850, shall be deemed in full force and effect.

Abb. Forms, 1377.

1. The sheriff's return is conclusive against the plaintiff, and his action must be for a false return. *Egery v. Buchanan*, 5 Cal. 53.

2. This return cannot be amended where a third party has acquired an interest adverse to the attachment. *Newhall v. Provest*, 6 Id. 85; *Webster v. Hensworth*, 8 Id. 21.

3. A mistake in the date of a sheriff's return may be amended at any time. *Dittler v. Scannell*, 11 Cal. 238.

TITLE IX.

CHAPTER V.—*Deposit in Court.*

SECTION 142. Deposit in Court.

143. Appointment of receiver.

§ 142. *Deposit in Court.*

When it is admitted, by the pleading or examination of a party, that he has in his possession, or under his control, any money, or other thing, capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs, or is due, to another party, the Court may order the same, upon motion, to be deposited in Court, or delivered to such party, upon such conditions as may be just, subject to the further direction of the Court.

N. Y. Code § 244, sub. 5.

§ 143. *Appointment of receiver.*

A receiver may be appointed by the Court in which the action is pending, or by a Judge thereof.

1st. Before judgment, provisionally on the application of either party when he establishes a *prima facie* right to the property, or to an interest in the property, [which] is the subject of the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired.

2d. After judgment to dispose of the property according to the judgment, or to preserve it during the pending of an appeal, and,

3d. In such other cases as are in accordance with the practice of Courts of equity jurisdiction.

¹Amended 1854, 88. N. Y. Code, § 244. Abb. Forms, 1485-1486.

1. Receiver, who may and may not appoint.—Under the statute, the county judge may grant an injunction in cases in the District Court, but he cannot appoint a receiver; at least, not a thing distinct from the injunction. *Androuff v. Kress*, 13 Cal. 639.

2. Courts of equity have the power to appoint receivers, and to order them to take possession of the property in controversy, whether in the immediate possession of the defendant or his agents; and in proper cases, they can also order the defendant's agents or employees, although not parties to the record, to deliver the specific property to the receiver. *Ex parte Cohen*, 5 Cal. 494.

3. **Receiver, his powers and duties.**—A receiver may employ counsel. *Adams v. Woods*, 8 Cal. 315.

4. Upon the application of the receiver, in the suit for dissolution, he can obtain the necessary proceedings for procuring a correct application of the balance of a judgment held by the partnership against a third party, after paying the judgment creditor of the partnership. *Adams v. Hackett*, 7 Cal. 187.

5. Generally, a receiver can pay out nothing, except on an order of the Court; but there are exceptions to the rule; nor will he be denied reimbursements in every case in which he neglects to obtain the order, especially in a Court of equity. *Adams v. Woods*, 15 Cal. 207.

6. Where a receiver was authorized by order of the Court appointing him to prosecute suits for the recovery of assets of the estate he represents, and certain important mercantile books belonging to such estate being lost, the receiver paid \$1,127 for their recovery without an order of Court. *Held*, that he was entitled to a credit for that sum as part of the necessary or appropriate expenditure of his office. *Id.*

7. On an application to the Court after final judgment, for an order for a receiver to pay over to the prevailing party money in his hands as receiver, it will not be presumed that the receiver has transcended his duties and took possession of property to which he was not entitled; nor is the opposite party entitled to have issues framed and submitted to a referee or jury to ascertain the ownership of the money in the receiver's hands. *Whitney v. Buckman*, 26 Cal. 451.

8. **Receiver, when he may be appointed.**—After verdict and judgment for plaintiff, in an action to recover possession of real estate, and while a motion for a new trial is pending, a receiver of the rents and proceeds of the property in dispute may be appointed, if the facts of the case are such as warrant it. *Id.*

9. In an action to recover the possession of land, after verdict and judgment for the plaintiff, if the defendant in possession is receiving monthly large sums of money from the sale of the waters of mineral springs on the land, and is insolvent, a receiver may be appointed, pending the further litigation, on motion for a new trial and appeal. *Id.*

10. If notice is given of an application for an injunction, and the petition prays for an injunction, the Judge, on the hearing, may appoint a receiver, if the facts make out a proper case for a receiver, and no objection is made on the ground of want of notice of the application. *Id.*

11. The purchaser at judicial sale of a mining claim, may, where the judgment debtor remains in possession, working the claims, and is insolvent, have a receiver appointed to take charge of the proceeds, during the period allowed by the statute for redemption. *Hill v. Tylor*, 22 Cal. 191.

In proceedings supplementary to execution, the Court may appoint when it has all the parties before it. *Hathaway v. Brady*, 26 Cal. 586.

12. **When a receiver should not be appointed.**—A Court of equity has no jurisdiction over corporations for the purpose of restraining their operations or winding up their concerns. Such Court may compel the officers of the corporation to account for any breach of trust, but the jurisdiction for this purpose is over the officers personally, and not over the corporation; hence, in this case, it was error in the Court below to appoint a receiver and decree a sale of the property and a settlement of the affairs of the corporation. *Neall v. Hill*, 18 Cal. 148.

13. In this case it was error in the Court below to appoint a receiver and decree a sale of the property and a settlement of the affairs of the corporation. *Id.*

14. Such decree necessarily results in the dissolution of the corporation, and would be doing indirectly what the Court has no power to do directly. *Id.*

15. Where the allegations of a bill are general in their nature, and the equities are fully denied by the answer, such a case is not presented as will justify the appointment of a receiver, the withdrawal of the property from the hands of one intimately acquainted with all of the affairs of the concern, and placing it in the hands of another who may not be equally competent to manage the business. *Williamson v. Monroe*, 3 Cal. 385.

16. In a foreclosure suit, the plaintiff has no right to have a receiver of rents and profits of the mortgaged property appointed pending the litigation. *Guy v. Ide*, 6 Cal. 101.

17. Creditors may attach after bill filed.—In a case where one partner has filed his bill for a dissolution of the partnership and the appointment of a receiver, it seems that until a dissolution has been judicially declared, and a receiver ordered to make a *pro rata* distribution of the assets among the creditors, they are not prevented from resorting to adverse proceedings, and thereby gaining a preference. *Adams v. Hackett*, 7 Cal. 187; *Adams v. Woods*, 8 Id. 152; 9 Id. 24; *Naglee v. Lyman*, 14 Id. 450.

18. Fees, disbursements, etc.—An order of Court directing a referee "to ascertain and report the amount of disbursements and expenses made with or under the direction and authority of the Court," by a receiver or custodian of money in the hands of the Court, is too narrow to do him justice, and should be so enlarged as to allow for all reasonable and proper expenses incident to the receivership. *Adams v. Haskell*, 6 Cal. 475.

19. And this, although the claim is for disbursements, etc., incurred by the custodian of the fund, under an appointment as assignee in a proceeding in insolvency, which was afterward held to be void. *Id.*

20. Receivers, or other custodians of money in the hands of a Court who are receivers except in name, as they are bound to obey the orders of the Court in their relation to the fund, as well as regards its safe custody as its return, are co-relatively entitled to the protection of the Court against loss for disbursements which were necessary and proper, and such as a reasonable and prudent man, acting as receiver, would have been justified in expending. *Id.*

21. Generally.—Where it appears that the partners, parties to the suit for a dissolution, held a judgment against a third party which was never reduced to the possession nor under the control of the receiver, the appointment of the receiver would not operate as an assignment or transfer of any property not so reduced to possession within a reasonable time. *Id.*

22. Per TRACY, J.—A fund in the possession of a receiver can only be distributed by the order of the Court in whose custody it is, and no party can, by adverse proceedings, acquire a lien over it. *Id.*

23. A receiver is appointed on behalf of all the parties who may establish rights in the cause, and the money in his hands is in *custodia legis*. *Adams v. Woods*, 8 Cal. 306.

24. The transfer to a receiver by order of Court of the effects of an insolvent in the suit of a judgment creditor, is not an assignment absolutely void under the Insolvent Act of 1852, according to any decision of the Supreme Court, but only void against the claim of creditors. *Naglee v. Lyman*, 14 Cal. 450.

25. The pendency of a motion for a new trial does not operate as a stay of proceedings, so as to deprive the Court of the power of vacating an order appointing a receiver made before the trial. *Copper Hill M. Co. v. Spencer et al.* 25 Cal. 15.

26. The appointment of a receiver rests in the sound discretion of the Court upon a view of all the facts; one of which is, that the party asking the appointment should make out a *prima facie* case; and after an *ex parte* appointment has been made, the order may be vacated, either before or after the trial, upon a proper showing. *Id.*

27. Where, pending an action, a receiver has been appointed, and on the trial judgment of nonsuit is rendered against the party at whose instance the receiver was appointed, a motion for a new trial suspends the operation of the judgment so as to prevent it from operating as a discharge of the action, unless an order is made discharging the receiver. *Id.*

28. Mining claims.—Suits in Justices' Courts.—The Justice may appoint, § 651, *post*.

TITLE X.

OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

CHAPTER I.—*Judgment in general.*

SECTION 144. Judgment, definition of.

- 145. Judgment may be for or against one of the parties.
- 146. Judgment may be against one party and action proceed on to the others.
- 147. The relief to be awarded to the plaintiff.
- 148. Action may be dismissed or nonsuit entered.
- 149. Judgment on the merits, when.

§ 144. *Judgment, definition of.*

A judgment is the final determination of the rights of the parties in the action or proceeding, and may be entered in term or vacation.

N. Y. Code, § 245; Bancroft's Forms, 564, 567; Abb. Forms, 1745, 1765.

1. Final judgment, what is.—The correct rule appears to be that the words "*final judgment*" must be understood as applying to all judgments and decrees which determine the particular cause, and that it is not requisite that such judgments should finally decide upon the rights which are litigated. *Bell v. Davis*, 1 Cal. 138.

2. In this case, the whole scope and object of the suit was to vacate the judgment in a former suit, and procure a new trial therein, that being the point in issue. The District Court set aside the judgment, and granted a new trial. *Held*, that the order setting aside the judgment was a final judgment. *Id.*

3. The case of *Loring v. Huley* (1 Cal. 28), explained. *Id.*

4. Every definite sentence or decision of a Court, by which the merits of a cause are determined, although it be not technically a judgment, or the proceedings are not capable of being enrolled so as to constitute what is technically called a record, is a judgment within the meaning of the law, and as such subject to the revisory jurisdiction of the Appellate Court. *Id.*

5. Judgment having been obtained against A., who was master and one-third owner of a certain bark, for the sum of \$2,000, in the Court of first instance, and his interest having been sold, and purchased by B.: *Held*, that a further judgment, rendered in a subsequent proceeding, ordering that the possession of the bark should be delivered to B., was erroneous. *Held*, also, that such judgment is a final judgment, over which this Court has appellate jurisdiction, under the act of February 28th, 1850. *Loring v. Huley*, 1 Cal. 24; see *Bell v. Davis*, *Id.* 134.

6. When the Court has jurisdiction of the question and the parties, its judgment, whether legal or illegal, proper or improper, is valid and binding, until reversed or set aside. *Reynolds v. Harris*, 14 Cal. 678; *Hahn v. Kelly*, Oct. T. 1867.

7. A judgment dismissing a suit, in which a temporary injunction had been granted, for want of prosecution, amounts to a determination by the Court that the injunction was improperly granted, and is in effect a final judgment against the defendant. *Dowling v. Polack*, 18 Cal. 625.

8. A dismissal of an action is in effect a final judgment in favor of the defendant. It is a final decision of that action as against all claims made by it, although it may not be a final determination of the rights of the parties,

as they may be presented in some other action. *Leese v. Sherwood*, 21 Cal. 151.

9. On a sale of land by L. and wife to S., a portion of the purchase money was paid, and a balance of \$14,000 was, by the terms of the deed, to be paid when an action, then pending by one Rico against the vendors to recover a portion of the property, should be "finally decided" in favor of the defendants therein (plaintiffs here) "as against all claims made by said Rico." By a contemporaneous agreement it was stipulated that a dismissal of the action of Rico should not be considered a final decision, provided a new suit for the same subject matter should be commenced by Rico on or before the eleventh day of April next succeeding the date of the agreement. The action of Rico was, on motion of the defendants therein, dismissed after the eleventh day of April, and thereupon L. and wife brought suit for the \$14,000. *Held*, that as the express stipulation about a dismissal evidently had reference to one procured before the eleventh day of April, a dismissal after that day was not affected by the stipulation, but was to have such force as should result from the other terms of the agreement; that under those terms a dismissal at any time was a final determination of the action, and that plaintiffs were entitled to recover. *Id.*

10. A judgment in favor of the plaintiff against one of several defendants, in an action to set aside a deed as a cloud upon the plaintiff's title, is an adjudication that the title is in the plaintiff. *Marshall v. Shafter*, 32 Cal. 176.

11. Although a judgment may be final with reference to the Court that pronounced it, and as such be the subject of appeal, yet it is not necessarily final with reference to the property or rights affected, so long as it is subject to appeal and liable to be reversed. *Hills v. Sherwood*, Oct. T. 1867.

12. Order, as contradistinguished from a final judgment, what is—As to what constitutes an order, see *Loring v. Tinsley*, 1 Cal. 27, and *Bell v. Davis*, *Id.* 126. See definition of *post*, § 515.

13. It may be defined to be the judgment or conclusion of the Court upon any motion or proceeding. It means cases where a Court or Judge grants affirmative relief, and cases where relief is denied. *Gilman v. Contra Costa County*, 8 Cal. 57.

14. The effect of an order of Court, general in its terms at the close, is to be ascertained by a reference to the motion upon which it was made, and which is recited at its commencement. *McKinley v. Tuttle*, Oct. T. 1867.

15. Judgment, how entered.—Where, in a suit to enforce a verbal contract for the sale of land—the complaint averring a balance of four hundred dollars to be due defendant when he should make a deed, and describing the land by its position with reference to adjoining tracts—a demurrer was put in, and being overruled, and defendant not answering, final judgment, by default, was entered for plaintiff—evidence being taken as to the contract by the referee—that plaintiff pay defendant three hundred dollars, the latter to make a deed of the land, which was described in the judgment by metes and bounds: *Held*, that the judgment is erroneous, both as to the amount adjudged due defendant and in describing the land by *metes and bounds*; that the judgment should have followed the complaint in both these particulars, and that the departure is material and fatal. *Holman v. Vallejo*, 19 Cal. 498.

16. If the verdict of the jury fails to find the lien, the Court cannot render a judgment essentially different from the verdict, and the judgment so far will be reversed. *Walker v. House-Hijo*, 1 Cal. 186.

17. Where a man is sued by a fictitious name, and the return of the sheriff on the summons shows service on the defendant by his proper name, as "John Doe, alias Westfall," a default being entered, judgment may be rendered against the defendant in his true name, Westfall, without proof that Doe and Westfall are the same. *Curtis v. Herriock*, 14 Cal. 117.

18. To authorize an arrest of the defendant upon execution issued upon a judgment recovered in an action upon contract, the fraud for which the arrest is sought must be alleged in the complaint, and be passed upon by the jury, and be stated in the judgment. *Davis v. Robinson*, 10 Cal. 411.

19. At one time, seven shares of stock in a company are pledged by de-

fendant to plaintiff as security for a note of defendant then executed. At another time, twenty more shares are pledged as security for another note of defendant then executed. In suit on the notes, and for sale of the stock, etc., the judgment was for the amount of the notes, and directed a sale of all the shares of stock and an application of the proceeds to the payment of the judgment. *Held*, that the judgment was wrong so far as it ordered a sale of the stock in gross, and an application of the proceeds to the entire indebtedness. *Mahoney v. Caperton*, 15 Cal. 313.

20. Where an action is brought by one of several persons, claiming title from a common source, on his own behalf, and in behalf of all others interested in the same manner as himself, to set aside a deed executed to others by the same grantor under whom plaintiff claims, on the ground of fraud, the parties named in the complaint, for whose benefit the action is brought, are entitled to the benefit of the decree declaring the deed fraudulent. *Hurlbut v. Buleop*, 27 Cal. 54.

21. Judgment should be entered at once, when.—Where there is no question as to the proper judgment to be entered on a verdict, the judgment should be entered at once, without waiting for a motion for new trial. *Hutchinson v. Bours*, 13 Cal. 51.

22. A suspension of all proceedings under the judgment fully protects the losing party from all loss or injury, if from any cause the verdict be set aside or the judgment vacated. *Id.*

23. Judgments entered in vacation.—Where the Supreme Court reverses the judgment of a District Court, and directs the entry of a final judgment, such judgment can be entered by the Clerk of the District Court in vacation. *McMillan v. Richards*, 12 Cal. 467.

24. In an action tried by the Court without a jury, judgment may be entered by the clerk in vacation upon the filing by the Judge of his findings and decision. *People v. Jones*, 20 Cal. 50.

25. If the judgment has been pronounced by the Court, drawn up in writing in the form intended to be entered, signed by the Judge, and filed with the clerk before the adjournment of the term, it has become the judgment of the Court of the term at which it was rendered, and the clerk may perform the ministerial act of entering it in the Judgment Book in vacation, without further direction. *Casement v. Ringgold*, 28 Cal. 335.

26. Ejectment judgment, extent and effect of.—In an action of ejectment to recover possession of a large tract of land, where the defendant failed to appear, and the case was submitted to the Court, who found that plaintiff had title to the whole tract, and that the defendant was in possession of a part—sixty or seventy acres—of the tract without right: *Held*, that it was proper for the Court to enter judgment for the plaintiff for the possession of the whole tract. *Vallejo v. Foy*, 10 Cal. 377.

27. Under our system, the judgment in ejectment is only conclusive of two points: the right of possession of the plaintiff, and the occupation of the defendant at the commencement of the suit. *Yount v. Howell*, 14 Cal. 465.

28. It is otherwise at the common law; there, the proof of title being held strictly to the date of the demise laid, the judgment was conclusive of such title. *Id.*

29. In suit against several defendants known as "Table Mountain Water Company," for possession of a ditch, the verdict was: "We find for the plaintiff and against L."—one of the defendants. Judgment was entered that defendant surrender possession of the ditch to plaintiff, and that plaintiff recover of L., "one of said defendants, the sum of —, his costs," etc. *Held*, that there is no error in the judgment; that it must be construed by the verdict, which is confined to plaintiff and L. *Threl v. Lafarge*, 15 Cal. 41.

30. A judgment in favor of plaintiff, even on the title, is conclusive, at most, of the title of plaintiff only, and not of his grantor. *Grady v. Early*, 18 Cal. 108.

31. In ejectment against several defendants occupying different portions of the property sued for, several judgments may be entered and at different

times; and this, whether upon trial or on separate findings or verdicts, or on findings by the Court, or after default. *Lick v. Stockdale*, 18 Cal. 219.

32. Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and a judgment by default is regularly entered, the judgment is valid. *Id.*

33. To a complaint in ejectment for a fifty-vara lot, the answer admitted the possession of defendants to the extent of one third, "more or less," and the witnesses who testified upon the subject stated that they (defendants) were "on the lot—a part of it," without showing of what particular part they were in possession. The judgment was for the recovery of the whole lot, with damages for its detention, and, on appeal, it was assigned as error that the evidence warranted a recovery of only a portion of the lot with proportional damages: *Held*, that under the pleadings and proofs the judgment was proper. *Guy v. Hamy*, 21 Cal. 397.

34. Under our Practice Act, if it appear that the plaintiff, in ejectment, had a right to recover at the commencement of the suit, but that his right has terminated during its pendency, he cannot recover the possession but only his damages. *Moore v. Tice*, 22 Cal. 513.

35. The plaintiff, in ejectment, to recover an undivided interest in land, may have a recovery of a less undivided interest than that sued for. *Halsey v. Martin*, 22 Cal. 645.

36. When several persons, whose possessions are not joint, but separate, are joined as defendants in an action to recover land, and no demand is made at the close of the trial for separate verdicts, and no objection or exception is taken to the verdict, on that ground, in time to afford an opportunity to correct it, the defendant cannot afterwards object to a joint verdict and judgment. *Hicks v. Coleman et al.*, 25 Cal. 145.

37. In an action of ejectment brought by E. against J. and L. and L., the Court found as a fact, that defendants had at all times since the ouster withheld the possession of the premises from the plaintiff, and gave judgment for plaintiff against the defendants jointly for damages during the whole time. The evidence showed that defendant J. had been in the exclusive possession of one hundred and twenty acres of the five hundred acres sued for, and had not been in possession during the whole time for which the damages were computed. The Court was not requested to distinguish in its findings from that made against L. and L. *Held*, that plaintiff was entitled to judgment against the defendants jointly. *Ellis v. Jeans*, 26 Cal. 275.

38. If, in an action against several defendants, sued jointly to recover the possession of a tract of land, the defendants swear in their answers, but do not demand separate trials, and the jury finds specially that the defendants are severally in possession of separate parcels of land sued for, and if, on appeal to the Supreme Court, that Court directs judgment to be entered in the Court below "for the plaintiff upon the special findings for the premises in controversy, pursuant to the prayer of the complaint," a joint judgment rendered in the Court below upon filing the remittitur there against all or a part of the defendants, is erroneous. *Leese v. Clark*, 28 Cal. 33.

39. In such case, notwithstanding the entry of the joint judgment, the plaintiff may apply for and have a several judgment against the defendants. *Id.*

40. In such case, also, the entry of a several judgment against part of the defendants is not a discontinuance of the action nor an abandonment of the same by the plaintiff as to the others, nor does it preclude him from afterward moving for and having a several judgment against a defendant not included in the first several judgment. *Id.*

41. Judgment against an infant.—It is at least questionable whether, under our system of practice, an infant is in any case or under any circumstances, entitled to have a day given in the judgment to show a cause against it. *Joyce v. McAvoy*, 31 Cal. 273.

42. An infant defendant is as much bound by a decree in equity as a person of full age, and will not be permitted to dispute it except upon the same ground as an adult might have disputed it, such as fraud, collusion, or error. If merely erroneous it is not void, but may be corrected on appeal. If fraud-

ulent, or obtained by collusion it must be attacked in a direct proceeding, and cannot be attacked collaterally. *Id.*

43. A judgment in equity against an infant where the Court has jurisdiction, which does not give the infant a day after arriving at age to show cause against it, is not void and cannot be attacked collaterally. *Id.*

44. Judgment against executors and administrators.—A judgment against an executor for a demand against the testator, should direct that the same be paid in due course of administration. *Racovillat v. Saxeusis*, 33 Cal. 376.

45. In an action against an administrator upon a rejected claim, the judgment should first ascertain the amount due, and adjudge the same to be a valid claim against the estate, and then provide that the same be paid by the defendant in the due course of administration. No execution can be awarded. *Rice v. Inskeep*, Oct. T. 1867.

46. Judgment against married woman.—A judgment may be rendered against a married woman for costs in an action brought by her as sole plaintiff, concerning her separate property, and when so rendered an execution in the usual form may be issued on the same, and her separate property sold by the sheriff, and the purchaser at the sheriff's sale, upon receipt of the sheriff's deed, acquires a valid title thereto. *Leonard v. Townsend*, 26 Cal. 442.

47. Judgment against husband and wife.—In suit against husband and wife for services rendered by plaintiff to the wife before her marriage, judgment may be entered against both defendants, with a direction that it be enforced only against the separate property of the wife and the common property of both. *Van Maren v. Johnson*, 15 Cal. 308.

48. When it is, and is not, a bar.—A judgment upon demurrer is not always a bar to a subsequent action. It is so only where it determines the merits of the case. *Robinson v. Howard*, 5 Cal. 423.

49. Where the answer shows that the demurrer was to the validity of the contract which gave rise to the claim, and this averment is found to be true, as alleged by the Judge at nisi prius, upon inspecting the record of the case, the judgment upon demurrer is a bar to the suit. *Id.*

50. A judgment of insolvency, where the Court had jurisdiction, if not reversed on appeal, is conclusive between the parties. *Kohlman v. Wright*, 6 Cal. 231.

51. The judgment of a Court of competent jurisdiction directly upon the point is, as a plea, a bar, and as evidence, conclusive between the same parties, upon the same matter directly, in another Court. *Love v. Wallis*, 7 Cal. 250.

52. A plea of a former suit pending is no bar to an action, where the complaint in the former suit is so defective that a judgment rendered thereon would be a nullity. *Reynolds v. Harris*, 9 Cal. 338.

53. Where there is a misdescription of a note, and a want of specification of the name of the real owner, or of any averment that his name is unknown, in the schedule of an insolvent, the proceedings in insolvency are no bar to a suit on the note, even if the insolvent did not know that the plaintiff was the real creditor. *Judson v. Atwell*, 9 Cal. 477.

54. To plead a former judgment in bar, it must appear, not only that it was upon the same cause of action, but between the same parties. *Uhlfelder v. Levy*, 9 Cal. 607.

55. When a defendant pleads another suit pending between the same parties, and for the same cause of action, and it appears that no summons was ever issued upon the complaint, and that there was no voluntary appearance on the part of the defendant in such suit: *Held*, that there was no suit pending. *Weaver v. Conger*, 10 Cal. 233.

56. Plaintiff brought an action of replevin against the defendants to recover certain property, and obtained a judgment for its restitution and damages for its illegal detention. Defendants paid the damages, but the property was not restored. Plaintiff then brought an action of trover to recover the value.

Defendants plead the former recovery as a bar. *Held*, that the judgment in *plevin* did not constitute a bar to the action of *trover*, the judgment in *plevin* not having been satisfied. *Nickerson v. Cal. Stage Co.*, 10 Cal. 520.

57. An action brought by an agent, in his own name, for a trespass, in taking and converting coin from the possession of the agent, in which action the jury found that the coin belonged to the principal, and gave only nominal damages, is no bar to an action by the principal for such coin. *Pico v. Webb*, 13 Cal. 140.

58. A discharge in insolvency of a debt is equally a discharge of a judgment on that debt, and the costs, rendered between the time of filing the petition and schedule, and the time of final discharge. *Inlay v. Carpenter*, 14 Cal. 175.

59. To plead a former judgment in bar, it must appear, not only that it was upon the same action, but between the same parties. *Chase v. Swain*, 9 Cal. 134.

60. In a chancery case, when all the proofs are in, and the case fully before the lower and the appellate Court, the judgment of the latter is conclusive, when it passes upon the merits of the controversy so presented; and on the reversal of the decree below, that court can take no further proceedings, unless authorized by the appellate Court, except such as are necessary to give effect to its judgment. The whole matter is *res adjudicata*. *Soule v. Davies*, 14 Cal. 249.

61. If an action be brought to recover possession of a lot of personal property, wrongfully taken and detained, and if the wrongful taking was one continuous and tortious act, a verdict and judgment, in that action, will be a bar to a subsequent suit for the remainder of the property. *Herriter v. Porter*, 23 Cal. 385.

62. Where, in an action at law, the defendants in their answer set up and claim a set off to plaintiff's demand, and, on the trial of the action, the record shows that the Court excluded all evidence of the demand sought to be set off, and gave judgment for plaintiff, the judgment in the action at law cannot be pleaded, as an estoppel in an action afterwards brought by the defendants in a Court of equity to enforce the set off. *Hobbs v. Doff*, 23 Cal. 598.

63. A judgment entered in an action to recover the possession of real estate, under our system of pleading and practice, is, as to all matters put in issue and passed on in the action, conclusive between the parties and their privies, and a bar in another action between the parties or their privies when the same matters are directly in issue. *Caperton v. Schmidt*, 26 Cal. 490.

64. The bar of a judgment and verdict, in an action to recover the possession of real estate, is limited to the rights of the parties as they existed at the time when it was rendered, and neither the parties nor their privies are precluded by the same from showing, in a subsequent action, that their rights have been waived or extinguished at a period after the rendition of the verdict and judgment. *Id.*

65. A judgment in favor of the plaintiff, in an action of ejectment, does not stop the defendant from maintaining an action for the specific performance of a contract, made by the plaintiff before the commencement of the action of ejectment, to convey the same land to the defendant; provided, the equitable defense was not set up in the answer and passed on by the Court. *Hough v. Waters*, 30 Cal. 309.

66. A judgment for plaintiff, in an action to quiet title, is a bar to subsequent litigation on the same subject matter. *Reed v. Culderwood*, 32 Cal. 109.

67. If two Mexican grants of land, made to different persons, are confirmed and surveyed so as to overlap each other in part, and the owner of one becomes a party to the proceedings relating to the confirmation and survey of the other, he is bound by the proceedings and estopped from afterwards denying that this grant was properly located. *Semple v. Wright*, 32 Cal. 859.

68. Judgment, when may, or not, be attacked collaterally.—See *Hahn v. Kelly et al.*, Oct. T. 1867.—A leading case.—A judgment by default, when summons has been served on defendant, cannot be attacked collaterally for a mere irregularity of service, or for a defective return. The defendant should assert his rights by appeal from the judgment. *Dorente v. Sullivan*, 7 Cal. 279.

69. A certificate of exemplification of a judgment rendered in another state, when attested by the Clerk under the seal of the Court, and when the presiding Judge of the Court certifies to that attestation as in due form of

law, is sufficient under the Act of Congress of May 26th, 1790, to sustain an action upon the judgment in another State. *Thompson v. Monroe*, 1 Cal. 426; *Park v. Williams*, 7 Cal. 249.

70. Where several persons were sued as members of a joint stock company, and the suit was discontinued as to B., one of the defendants, and judgment was taken against all the others, upon which execution was subsequently issued, and the property of one M., who was not a party to the suit, taken to satisfy the same: Held, that M. cannot, by a bill in equity against the plaintiff in the judgment, set it aside upon the ground that the discontinuance of the suit as to B. was a discontinuance as to all of the defendants. The judgment cannot be attacked in this collateral manner. *Markley v. Rand*, 12 Cal. 275.

71. The recital in a decree "that defendants had been regularly served with process, or had waived service by their acknowledgment," is sufficient evidence that the requisite proof was produced. In the absence of all evidence on this point, the presumption would be in favor of the jurisdiction of the Court, and of the regularity of its proceedings; and, for the want of such evidence, the decree cannot be impeached in a collateral action. *Alderson v. Bell and Wife*, 9 Cal. 315.

72. A decree cannot be impeached collaterally because entered prematurely. The remedy is by a direct proceeding in the action. *Id.*

73. Where a judgment was rendered by confession in open Court, upon an allegation of indebtedness and appearance of the parties, whatever errors intervened, they cannot, at the instance of one not a party to the judgment, be invoked to set aside or show the judgment a nullity. *Cloud v. El Dorado County*, 12 Cal. 128. There is a very decided distinction between want of jurisdiction and irregularity in procuring jurisdiction. *Whitwell v. Barber*, 7 Cal. 54.

74. A judgment can be attacked in any form, directly or collaterally, for want of jurisdiction, but only by a direct proceeding against the judgment, in the Court which rendered it, or in an appellate Court, upon appeal from the judgment, when there is an irregularity in procuring jurisdiction. *Id.*

75. The true test in such cases is whether the omission complained of is of the substance of the act required to be performed. If of the substance, then the judgment is a nullity; if of form, only an irregularity. *Id.* See *Hahn v. Kelly*, Oct. T. 1867.

76. A personal judgment of a Court of general jurisdiction is invalid for the purpose of acquiring any rights under it, when it appears affirmatively upon the face of the record that the Court had acquired no jurisdiction over the person of the defendant.

77. If a judgment is pronounced by a Court having jurisdiction, no matter how irregular it may be, it must stand until set aside or reversed on appeal; but when entered by a mere ministerial officer without authority of law, it is void. *Stearns v. Aguirre*, 7 Cal. 448. Partially overruled in *Lewis v. Clark*, 18 Cal. 399.

78. The Board of Supervisors of a county is a special tribunal with mixed powers, administrative, judicial and legislative, and jurisdiction over roads, ferries and bridges, is given to it by statute. Its judgments and orders cannot be attacked collaterally, any more than the judgments of Courts of record. *Waugh v. Chancey*, 13 Cal. 12.

79. A decree of the Probate Court, ordering a claim to be paid, rendered on petition of the administrator, and without objection by him, is final and conclusive, and cannot be assailed collaterally nor directly, on the ground that it was rendered on insufficient evidence. *Estate of Cook*, 14 Cal. 130; *State v. McGlynn*, 20 Id. 233.

80. In suit in the District Court, on a bond given in the Court of Sessions for the appearance there of a party indicted for misdemeanor—the Court of Sessions having declared the bond forfeited for non-appearance—the sureties cannot defend on the ground that the judgment of forfeiture was erroneous. That judgment cannot be thus revised. *People v. Wolf*, 16 Cal. 385.

81. The judgment of the Supreme Court, being conclusive so long as it stands, cannot be attacked collaterally, on the ground that parties to it did

not prosecute the appeal, but must be set aside, if at all, by a direct proceeding impeaching it for fraud. *Bostic v. Love*, 16 Cal. 72.

82. A judgment void for want of personal jurisdiction is not cured by the appearance of the party for the purpose of vacating it. *Gray v. Hawes*, 8 Cal. 383.

83. If it appear by the record, or otherwise, that the Court never had jurisdiction over the person of the defendant, the judgment will be pronounced a nullity, whether it comes directly or collaterally in issue, and a sale of property under it will be void also. *McMinn v. Whelan*, 27 Cal. 308.

84. If a defendant is served with process, a judgment by default against him is not void, though he is sued by a wrong name. *Welch v. Kirkpatrick*, 30 Cal. 202.

85. If a complaint in an action against a company by its company name states substantially the conditions mentioned in the six hundred and fifty-sixth section of the Practice Act, and the sheriff returns that he has served the summons on one of the members of the company, and judgment by default is entered up against the company by its name, to be enforced against the joint property of the members, that the judgment is not void, but may be enforced by execution against the company's property. *Id.*

86. Such judgment is not a judgment against the person served with process, but against the company. *Id.*

87. Query. If in a judgment against a company name under the six hundred and fifty-sixth section of the Practice Act, there is an entire absence of any statement showing the existence of the conditions named in the section, and judgment is rendered against the company by default, is the judgment void or are these conditions matters to be pleaded in abatement, and if not thus pleaded, waived. *Id.*

88. A judgment entered by the clerk upon default for a sum greater than is demanded in the prayer of the complaint and specified in the summons, is not void, but is simply erroneous, and may be enforced until modified on motion or on appeal. *Bond v. Pacheco*, 30 Cal. 530.

89. In an action at law upon a judgment of a Court of general jurisdiction, the defendant, as a matter of defense at law, cannot show that the judgment was fraudulently obtained, except by an examination of the record itself. *Carpenter v. City of Oakland*, 30 Cal. 439.

90. A judgment in equity against an infant, where the Court has jurisdiction, which does not give the infant a day after arriving at age to show cause against it, is not void, and cannot be attacked collaterally. *Joyce v. McAvoy*, 31 Cal. 273.

91. Void judgment.—A personal judgment of a Court of general jurisdiction is invalid for the purpose of acquiring any rights under it, when it appears affirmatively upon the face of the record that the Court had acquired no jurisdiction over the person of the defendant. *Whitwell v. Barbier*, 7 Cal. 54.

92. There is, however, a very decided distinction between want of jurisdiction and irregularity in procuring jurisdiction. *Id.*

93. In the one case, the judgment can be attacked in any form, directly or collaterally; in the other, only by a direct proceeding against the judgment in the Court which rendered it, or in an appellate Court upon appeal from the judgment. *Id.*

94. The true test is, whether the omission be of the form or of the substance of the act required to be performed. *Id.*

95. A summons was served by a deputy sheriff and returned with the following signatures to the return: "Elijah T. Cole, D. S." Judgment was rendered by default. *Held*, that the judgment was null and void, for want of jurisdiction. *Rowley v. Howard*, 23 Cal. 401.

96. A judgment entered to the Clerk by default, where there has been no service of summons or appearance, is utterly void. *Glidden v. Packard*, 28 Cal. 649.

97. When the Clerk has authority to enter judgment out of Court by default, but in the exercise of his authority makes a mistake as to the amount, the judgment is not void, but erroneous; ; but where he enters a kind of

judgment which he has no authority to enter without the direction of the Court, the judgment thus entered is void. *Bond v. Pacheco*, 30 Cal. 530.

98. A judgment absolutely void upon its face may be attacked anywhere directly or collaterally, either by parties or strangers. *Forbes v. Hyde*, 31 Cal. 342.

99. After appeal, the Court below loses control over the judgment.—Where a judgment is rendered, and an appeal taken to this Court, the Court below loses control over the judgment, and an order amending the judgment is erroneous. *Bryan v. Berry*, 8 Cal. 135.

100. Presumptions in favor of Courts of general jurisdiction, etc.—The presumption in favor of a judgment of a Court of general jurisdiction is overthrown, when the record of the entire case discloses a want of jurisdiction. *Gray v. Hawes*, 8 Cal. 569.

101. The appellate Court will presume in favor of the judgment of the Court below, unless the record clearly show error. *Thompson v. Monrow*, 2 Cal. 100; *Kilburn v. Ritchie*, 2 Id. 148; *White v. Abernathy*, 3 Id. 426; *Johnson v. Sepulveda*, 5 Id. 151; *Grewell v. Henderson*, 7 Id. 292; *Nelson v. Lemmon*, 10 Id. 50.

102. Jurisdiction will generally be presumed in the case of superior Courts; but if the want of jurisdiction appears on the face of the record of the judgment of a superior Court, the judgment is void, and it may be attacked in a collateral proceeding. *Forbes v. Hyde*, 31 Cal. 342. Affirmed in *Haka v. Kelly*, Oct. T., a leading case.

103. A party against whom a judgment has been rendered, by a Court of general jurisdiction, will be presumed to have been made a party to the suit in some of the ways provided by law, unless the contrary appears affirmatively by the record. *Sharp v. Daughey*, Oct. T. 1867.

104. Effect of reversal of judgment.—Where an execution on a judgment for the recovery of money is not stayed by the undertaking on appeal, required by statute for that purpose, a sale may be made on the execution, and the rights of purchasers are in no respect affected by the subsequent reversal of the judgment. *Farmer v. Rogers*, 10 Cal. 335.

105. If, on sale under judgment, the plaintiff or his assignee buys in the property, he must restore it to the defendant on reversal of the judgment; otherwise, as to a stranger, a *bona fide* purchaser without notice. *Reynolds v. Harris*, 14 Cal. 680.

106. Where a party to a judgment has obtained any advantage through the judgment, he must restore that advantage to the other party, if the judgment be afterward reversed. *Id.*

107. A judgment unreversed and not suspended may be enforced, but when reversed it is as if never rendered; and money collected by authority of it may, as a general rule, be recovered back. *Ram v. Reynolds*, 18 Cal. 275.

108. Where the judgment of the appellate Court directs the Court below what judgment to render, a new trial in the Court below is not authorized, and a judgment rendered upon such a new trial is null and void. *Argenti v. The City of San Francisco*, 30 Cal. 458; see further, § 345, *post*; title, “Effects of reversal.”

109. Identity of judgments.—A judgment was obtained against one John P. Manrow, in the city of New York, and an action was brought upon a judgment against one John P. Manrow, in the city of San Francisco; the identity of the person was held to be presumed. *Thompson v. Manrow*, 1 Cal. 423. [See *People v. Thompson*, 28 Cal. 218, and authorities there cited.]

110. Attorney has no lien on a judgment.—The attorney has no lien upon a judgment recovered by him in favor of his client for a *quantum meruit* compensation for his services; such lien extends only to costs given by statute. *Es parte Kyle*, 1 Cal. 332; *Mansfield v. Dorland*, 2 Id. 509; *Russell v. Coney*, 11 Id. 103.

111. When equity will, and will not, interfere.—See *ante*, § 112, note No. 54.

112. Effect of recitals in a judgment.—The recitals in a several judg-

ment against one of a number of defendants, that in a former judgment in the same action the name of this defendant was stricken out on plaintiff's motion, is *prima facie* evidence only of the fact, and may be contradicted by the recitals in said former judgment. *Leese v. Clark*, 28 Cal. 33.

113. The recital in a judgment that a party defendant, against whom it is entered, appeared in the action, is *prima facie* evidence only of the fact. *Id.* See *Hahn v. Kelley*, Oct. T. 1867.

114. The recital of service of summons in a judgment is conclusive of the fact in a collateral proceeding. *Sharp v. Lumber*, Jan. T. 1868. See further *Hahn v. Kelly*, Oct. T. 1867.

115. As between parties and privies.—A judgment is of no force, except between the parties and privies. *Beckett v. Selover*, 7 Cal. 228.

116. A judgment record is only conclusive between parties and their privies, except in some cases for specific purposes. *Davidson v. Dallas*, 8 Cal. 227.

117. A purchaser of land, subsequent to a suit brought against his vendors to quiet title, and to a notice of *lis pendens* filed in the county recorder's office, is a mere volunteer, who takes subject to any decree in the suit. *Gregory v. Haynes*, 13 Cal. 494.

118. One in possession of land, who is neither a party nor privy to a judgment for the recovery of possession of it, is neither affected by the judgment, as an instrument of evidence, nor can he be dispossessed by virtue of a writ issued upon it. *Le Roy v. Rogers*, 30 Cal. 229.

119. Alteration without notice.—An alteration of a judgment by the Court, without notice, so as to include a party not served with process, if not void, is voidable, at the election of the party. *Chester v. Miller*, 13 Cal. 561.

120. Where the Court makes an order requiring plaintiff to appear at a certain time, and show cause why a judgment in his favor should not be set aside, and it does not appear that a copy of the order was served on plaintiff or his attorney, or that any notice was given of the time at which the matter was to be heard, it is error for the Court to set aside the judgment, and its order to that effect will be reversed on appeal. *Vallejo v. Green*, 16 Cal. 161.

121. Power of the court over judgments, setting aside, opening defaults, etc.—See § 68, *ante*, note, Nos. 32, 49, *et seq.*

§ 145. Judgment may be for or against one of the parties.

Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

N. Y. Code, § 274. See *ante*, § 32. Abb. Forms, 1750-1752.

1. Where two persons are sued jointly upon a joint contract, judgment may be rendered in favor of the plaintiff against one of the defendants and in favor of one of the defendants against the plaintiff. Thus where A. sued B. and C., as partners, and the misjoinder was not set up in the answer, and the plaintiff's demand was proved against B., but not against C., and verdict and judgment were given in favor of the plaintiff against B., and in favor of C. against the plaintiff, on appeal the judgment was affirmed. *Rowe v. Chandler*, 1 Cal. 167.

2. Where it is clear that two or more defendants are not liable jointly, a joint judgment against both cannot be sustained, although each may be severally liable; so held in an action by a lessor against two sub-tenants of his lessee, when it appeared that the sub-tenants did not occupy any portion of the premises jointly. *Pierce v. Minturn*, 1 Cal. 470.

3. Where some of the defendants, partners, are not served with process, the plaintiff may proceed against those served. *Ingraham v. Gildemeester*, 2 Cal. 88.

4. A covenant not to sue, made to a portion only of joint debtors, does not release any of them. *Matthey v. Gally*, 4 Cal. 64.

5. In an action against defendants jointly indebted, where only one is served, a several judgment may be entered against him. *Hirschfeld v. Franklin*, 6 Cal. 607.

6. In an action brought jointly against two defendants, on a joint and several obligation, the entry of final judgment on default against one of the defendants is a discharge of the other. *Stearns v. Aguirre*, 6 Cal. 182. This case has been partially overruled in *Lewis v. Clarkin*, 18 Id. 399.

7. In all cases of joint and several contracts, the plaintiff may elect whether he will sue the defendants severally or jointly; having elected to treat his demand as joint for the purposes of the action, he must be governed by the same rules which would have applied if his contract originally had been joint, and not joint and several; and it is clearly error to enter several judgments against the defendants. *Id.*

8. Where two defendants are jointly sued, and service had on both, the clerk of the Court has no authority to enter judgment by default against one; and his act in so doing is without color of law and void, and may be disregarded or set aside. *Stearns v. Aguirre*, 7 Cal. 449.

9. Where the plaintiff establishes his right to recover against both defendants, judgment should be entered against them. *Id.*

10. Where the obligors in a sheriff's bond bind themselves, jointly and severally in specific sums designated, they may all be joined in the same action, but separate judgments are required. *People v. Edwards*, 9 Cal. 286.

11. A judgment against one or more joint guarantors of a note bars the action against the others. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. *Brady v. Reynolds*, 13 Cal. 31.

12. Equity has jurisdiction to vacate a judgment, fraudulently altered, so as to include a defendant not served with process and not originally included in the judgment. *Chester v. Miller*, 13 Cal. 558.

13. Where, in an action against defendants jointly and not severally liable, a portion only of them are served with process, the clerk cannot, on the application of plaintiff, enter judgment upon default against parties served only. A judgment so entered is void. *Kelley v. Austin*, 17 Cal. 564.

14. The proper course in such case is, to enter judgment against all the defendants, but so as to be enforced against the joint property of all and the separate property of those served. *Id.*

15. Where three persons are sued on a promissory note given by one of the parties in the name of all as partners, and the evidence fails to show the partnership, or the authority of the party making the note to bind all, and one of the parties is nonsuited and judgment taken against the other two: *Held*, that there is no error in such judgment. *Stoddard v. Van Dyke*, 12 Cal. 438.

16. In suit, on an account against "Randall & Inas," partners, the former only being served with process, a joint judgment was rendered against both: *Held*, that the judgment is void as against the party not served. *Inas v. Wispear*, 18 Cal. 397.

17. Plaintiff sells goods to C. on his individual account. Subsequently, C. directs plaintiff to charge the goods to the joint account of C. and J., which is done. Plaintiff sues C. and J. jointly. Proven that C. had no authority to bind J. *Held*, that, although J. is not liable, judgment may be rendered against C.; that our Practice Act (Sec. 145) has modified the common law rule; that, in suit against several joint debtors, plaintiff must recover against all or none—so far, at least, as to permit judgment against a portion of the defendants wherever the contract purports on its face to be the contract of all the parties sued, and it turns out in proof that a portion only are liable. *Lewis v. Clarkin*, 18 Cal. 399.

18. In suit against two on a joint assessment for taxes, judgment may be rendered against one only of the defendants, if the other be not liable. *People v. Frisbie*, 18 Cal. 402.

19. The common law rule, that where defendants are sued on a joint contract, recovery must be had against all or none, modified by our Practice Act. *Id.*

20. *Query*: whether the rule is entirely abrogated. New York cases cited. *Id.*

21. A judgment in an action against the sureties on an official bond, for a defalcation of the principal, should first fix the amount of the defalcation and then proceed with a separate judgment against each of the sureties for the full amount for which he made himself liable in the bond, and costs, and then close with a proviso, that each judgment shall be satisfied by the collection or payment of the amount of the defalcation, and costs. *People v. Rooney*, 29 Cal. 642.

22. Where an action is brought by one of several persons, claiming title from a common source, on his own behalf and in behalf of all others interested in the same manner as himself, to set aside a deed executed to others by the same grantor under whom plaintiff claims, on the ground of fraud, the parties named in the complaint, for whose benefit the action is brought, are entitled to the benefit of the decree declaring the deed fraudulent. *Hurlburt v. Butler*, 27 Cal. 54.

23. Where a decision is made in a suit in equity upon any particular subject matter, the rights of all persons whose interests are immediately connected with that decision, and affected by it, should be provided for. *McPherson v. Parker*, 30 Cal. 455.

§ 146. *Judgment may be against one party and action proceed as to others.*

In an action against several defendants, the Court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

See *ante*, § 145, 32; N. Y. Code, § 274.

§ 147. *The relief to be awarded to the plaintiff.*

The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case, the Court may grant him any relief consistent with the case made by the complaint, and embraced within the issue.

N. Y. Code, § 275.

1. Where judgment is taken by default, no relief can be given beyond that demanded in the complaint. *Raven v. Reynolds*, 11 Cal. 19.

2. A judgment by default for an amount exceeding that asked for in the prayer of the complaint is erroneous. *Gage v. Rogers*, 20 Cal. 91.

3. Where the complaint prayed judgment for a certain amount alleged to be due as principal and interest of the note sued on, and that the judgment bears interest at a certain rate, and judgment by default was subsequently rendered for the amount, with interest from the date of filing the complaint: *Ibid.* that the judgment was erroneous in awarding interest from the date of filing the complaint instead of the date of its entry. *Id.*

4. A judgment rendered in an action on contract in favor of plaintiff on the complaint alone, after striking out for irregularity an answer previously filed by defendant, must be considered as a judgment by default, and is therefore erroneous if rendered for a greater amount than that for which the summons stated judgment could be taken. *Lattimer v. Ryan*, 20 Cal. 628.

5. If in an action on a promissory note a trial is had, the Court may render judgment for the amount of the note and interest, and make the judgment bear the same rate of interest as the contract, although the complaint only says for judgment for the face of the note. *McComb v. Reed*, 28 Cal. 289.

6. If no answer is filed, judgment may be rendered for the principal, and in-

terest added thereto, although the complaint only prays for judgment for the principal. This is not a case by default. *Cassacia v. Phoenix Ins. Co.*, 28 Cal. 628.

7. In a judgment, by default, to foreclose a mortgage, it is improper to include counsel fees, the amount paid for taxes, together with the interest thereon, if such relief was not demanded in the complaint. *Janson v. Smith*, Jan. T. 1886.

8. It is error, where a judgment by default exceeds the relief demanded in the complaint. *Parrott v. Den*, Oct. T. 1867.

9. If judgment is rendered in favor of plaintiff, by default, the Court cannot grant any greater relief than is demanded in the prayer of the complaint and specified in the summons. *Lamping & Co. v. Hyatt et al.*, 27 Cal. 102.

10. If the complaint, on a promissory note, prays for judgment for a sum certain, which sum is the principal and interest due when the complaint is filed, judgment by default should not include interest accruing after the complaint is filed. *Id.*

11. If the prayer for judgment asks for interest to accrue after the complaint is filed, and neither the prayer or summons mention the rate of interest, the clerk should not render judgment for a rate greater than ten per cent. per annum. *Id.*

12. If the complaint does not pray for a gold coin judgment, and the summons does not say that judgment will be taken for gold coin, the clerk should not on default render a gold coin judgment. *Id.*

13. Judgment by default, in a suit on a note drawing interest at more than ten per cent. per annum, should not direct that the judgment bear interest at the agreed rate, unless the complaint pray that the judgment bear interest at the rate named in the note. *Gautier v. English*, 29 Cal. 165.

14. A judgment entered by the clerk upon default, for a sum greater than is demanded in the prayer of the complaint, and specified in the summons, is not void but is simply erroneous, and may be enforced until modified on motion or on appeal. *Bond v. Pacheco*, 30 Cal. 531.

15. Where an answer is filed the Court may grant any relief consistent with the case made by the complaint, and embraced within the issue. *Savings and Loan Society v. Thompson*, Oct. T. 1867.

16. The provisions of this section apply to *Mandamus* and *Quo warranto*; *People v. Board of Supervisors, San Francisco Co.*, 27 Cal. 655.

17. Judgments in gold coin, etc.—See *post*, § 150; note No. 21, and notes to § 200, 6-24.

18. Judgments by default—See further *post*, § 150, and notes.

§ 148. Action may be dismissed or nonsuit entered.

An action may be dismissed or a judgment of nonsuit entered in the following cases :

1st. By the plaintiff himself, at any time before trial, upon the payment of costs, if a counter claim has not been made. If a provisional remedy has been allowed, the undertaking shall thereupon be delivered by the clerk to the defendant, who may have his action thereon :

2d. By either party, upon the written consent of the other :

3d. By the Court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal :

4th. By the Court, when upon the trial, and before the final submission of the case, the plaintiff abandons it :

5th. By the Court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions, shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly.

Abb. Forms, 1747.

1. First subdivision.—Plaintiff has not the absolute right to take a nonsuit after the case has been finally submitted and the jury has retired; but such right does not exist at any time before such final submission and retirement. *Brown v. Harter*, 18 Cal. 76.

2. Plaintiff has a right to take a nonsuit at any time before the jury retires, there being no counter-claim. *Hancock Ditch Co. v. Bradford*, 13 Cal. 637.

3. Nor, under the one hundred and forty-eighth section of the Practice Act, is he bound to tender costs before the nonsuit. The provision as to costs is simply that, by the nonsuit, plaintiff becomes subject to costs. *Id.*

4. C. being one of four defendants in ejectment, moved to transfer the action to a United States Court on the ground of his alienage, and an order was made staying all proceedings until the motion could be heard. Before the hearing of the motion, plaintiff's dismissed the action as to C. and one other defendant, and took judgment against the other two who had made default. C. afterwards insisted upon his motion, and filed affidavits tending to show that the defaulting defendants were occupying the premises as his tenants, and were colluding with the plaintiff. The motion was denied, and C., having appealed from that order and from the judgment: *Held*, that the denial of the motion was proper, as after C.'s dismissal it could not properly be entertained. *Reed v. Calderwood*, 22 Cal. 463.

5. If a plaintiff who had appeared by attorney, afterwards stipulates in writing that the action be dismissed, the Court should not make an order of dismissal unless the attorney of record assents to the same. *Board of Commissioners v. Younger*, 29 Cal. 147.

6. In an action of ejectment against several defendants, the plaintiff may at any time before trial dismiss the action as to some of the defendants, and proceed against the others alone. *Reed v. Calderwood*, 22 Cal. 463.

7. If one of several defendants in ejectment answers and the others make default, the plaintiff may, before trial, dismiss the action as to the defendant answering, and take judgment against the others. *Dinick v. Deringer*, 32 Cal. 488.

8. In an action upon a joint and several bond, where all the persons who sign it are made defendants in the complaint, the plaintiff may go to trial, if he elects so to do, before all the defendants are served, and may dismiss as to some of the defendants, and take judgment against the others. *People v. Evans*, 29 Cal. 423.

9. The plaintiff in ejectment, if no counter-claim is made in the answer, has a right to dismiss the action as to one or all of the defendants. *Dinick v. Deringer*, 32 Cal. 488.

10. The defendant in his answer to the complaint set up a cross demand which he insisted was a proper counter-claim, and prayed affirmative relief. Afterwards a stipulation, signed by the attorneys of the respective parties, was filed, whereby it was provided that upon the trial of the cause an account might be taken of the matter thus set up; that if a balance might be entered, that the stipulation should be regarded as a compromise of the counter claim, and that the counter-claim should be deemed stricken from the answer. *Held*, that on this state of the record, the Clerk was not required or authorized by section one hundred and forty-eight of the Practice Act, in the absence of any direction from the Court or counsel of the defendant, to enter an order upon request of plaintiff dismissing the action. *People v. Loery*, 29 Cal. 264.

11. The construction of the pleadings and stipulation, and determination

of the rights of the parties with respect to the counter-claim under them, required the exercise of judicial functions not conferred upon the clerk. *Id.*

12. Where a counter-claim has been set up in an answer, and a stipulation filed in which it was provided that its provisions were accepted as a compromise of the counter-claim set up, and that the counter-claim should be deemed stricken from the answer, and also that an account of the rents and profits demanded in the counter-claim should be taken, and if there was any balance remaining after satisfying the amount for which the mortgage could be enforced by the relator against the respondent, that then a judgment should be entered for the payment of the same to the respondent: *Held*, that the clerk had no power to enter a dismissal without an order of Court. *Pothenus v. Loewy*, Oct. T. 1865.

13. Second subdivision.—After an action has been tried and submitted, the plaintiff has no right to dismiss it, nor has the Court any authority to enter an order of dismissal without the consent of the defendant. *Hendin v. Castro*, 22 Cal. 101.

14. Third subdivision.—Where the plaintiff fails to appear and prosecute his suit, and the defendant moves for a nonsuit, the Court has no alternative but to grant it. *Peralta v. Maria*, 3 Cal. 185.

15. Fifth subdivision.—Where four persons were sued as co-defendants on a joint contract, and the plaintiff adduced no evidence to establish the joint liability of all, and a motion for a nonsuit was made on this ground, but refused by the Court, and judgment was rendered against all the defendants, jointly: *Held*, that the judgment was erroneous; but *Held* further, that the plaintiffs might have discontinued the suit as against those not shown to be liable, and have proceeded to judgment against those whose liability was established, upon such terms and conditions as should appear to be just. *Acquital v. Crowell*, 1 Cal. 191.

16. If there be some evidence which tends or conduces to prove all the material allegations of the complaint, the sufficiency thereof is a question for the jury; but where there is no evidence on some material point necessary to be proved in order to make out a cause of action, it becomes the duty of the Court, on motion of the defendant, to order a nonsuit. *Ringgold v. Brown*, 1 Cal. 108.

17. An action was brought against the defendants to recover damages for injuries to goods, in being carried from New York to San Francisco, founded not upon contract, but upon the common law duty of carriers. *Held*, that it was necessary for the plaintiff to establish, not only the delivery of the goods to the defendants, but that they were engaged in the business of transporting goods as common carriers; and there being no evidence whatever that the defendants were common carriers: *Held*, also, that a motion for a nonsuit should have been granted by the Court below. *Id.*

18. The doctrine of *Ringgold v. Haven & Livingston* (1 Cal. 108), that it is the duty of the Court in a proper case to nonsuit the plaintiff, affirmed. *Dairyman v. Hanson*, 1 Cal. 125.

19. Where there is no evidence to make out a cause of action, the Court should nonsuit the plaintiff. *Id.*

20. It is error to refuse, in an action of ejectment, a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action. *Garner v. Marshall*, 9 Cal. 268.

21. In ejectment, upon disclaimer of possession or interest in the property, a judgment for the plaintiff cannot be entered. When such disclaimer is relied upon, the only proper judgment is one of nonsuit. *Noe v. Card*, 14 Cal. 576.

22. When the evidence, and the presumption reasonably arising therefrom, tend to prove the facts in controversy, a nonsuit is improper. The case should be submitted to the jury. *De Ro v. Cordes*, 4 Cal. 117.

23. Nonsuit not proper where there is any evidence tending to prove the indebtedness. *Cravens v. Dewey*, 13 Cal. 40.

24. If the evidence of the plaintiff will not authorize a jury to find a verdict for him, or if the Court would set it aside, if so found, as contrary to evidence,

it is the duty of the Court to nonsuit the plaintiff. *Mater v. Brown*, 1 Cal. 221.

25. Courts should, of their own motion, dismiss a case based upon a consideration which contravenes public policy, whether the parties to the suit take the objection or not. *Valentine v. Stewart*, 15 Cal. 387.

26. If the complaint avers that the defendant brought a false charge against the plaintiff, and threatened to publish the same and injure his credit unless he paid a false account, and that by reason of the false charge and threats he paid the same without other consideration, and prays judgment for the money thus paid, the payment of the money without consideration is the gist of the plaintiff's cause of action, and upon that issue he holds the affirmative. If he fails to offer any evidence of the facts tending to show a want of consideration, a nonsuit should be granted. *Kohler v. Wells, Fargo & Co.*, 26 Cal. 607.

27. A nonsuit should not be granted if there is evidence tending to prove all the material allegations of the complaint. *McKee v. Greene*, 31 Cal. 418.

28. In considering the correctness of the ruling of the Court below, in granting a nonsuit, the Supreme Court will consider as proven every fact which the evidence tended to prove, and which was essential to be proven, to entitle the plaintiff to recover. *Dow v. Gould & Curry Silver Mining Co.*, 31 Cal. 630.

29. A party moving for a nonsuit should state in his motion precisely the grounds upon which he relies, so that the attention of the Court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case. *People v. Barnard*, 27 Cal. 474.

30. Where, in an action for breach of verbal contract, there was a slight difference between the statement of the complaint and that in the answer of the promises, on the part of the plaintiff, which were the consideration of defendant's promise, but no issue was raised by the answer as to the performance by plaintiff of his promises, and on the trial, plaintiff rested without proof as to the consideration: *Held*, that under the pleadings, the absence of proof on this point was not ground for a nonsuit. *Peters v. Foss*, 20 Cal. 586.

31. When the plaintiff closes his evidence, if the Court is of opinion that it would not sustain a verdict in favor of plaintiff upon the testimony, a nonsuit should be granted. *Ensminger v. McIntire*, 23 Cal. 593.

32. Where, in an action on a verbal contract, the complaint alleged several distinct promises on the part of defendants, which were denied by the answer, and on the trial the plaintiff introduced no proof except as to one of the promises: *Held*, that this was not ground for nonsuit; that the provision of the Practice Act above referred to require a relaxation of the common law rule respecting a variance, and that it being apparent that defendants were not surprised or prejudiced by the failure of proof, the error in stating the agreement should have been disregarded. *Peters v. Foss*, 20 Cal. 586.

33. In an action of ejectment, one of several defendants, who in his answer disclaims all right, title and interest in the premises, but also denies all the allegations of the complaint, and avers that "he was and still is lawfully seized and in possession" of the land claimed, is a proper party, and is not entitled to have the action dismissed as to himself. *Pioche v. Paul*, 22 Cal. 105.

34. It is not error to nonsuit plaintiffs upon the opening statement of their counsel. *Hoffman v. Fell*, Oct. T. 1867.

35. Referee may grant.—Under our statute, the referee takes the place of the Judge, in the trial of all cases referred to him, and may grant a nonsuit. *Piant v. Fleming*, 20 Cal. 92.

36. A plaintiff can voluntarily submit to a nonsuit before a referee in a case where no counter-claim is set up by the defendant. *Id.*

37. What operates as a discontinuance.—The plaintiff commenced an action of forcible entry and detainer against the defendant, in a Justice's Court. The Justice, instead of trying the case, certified it to the District Court. *Held*, that the transfer was illegal, and could not defeat the plaintiff's right by operating as a discontinuance. *Larue v. Gasolina*, 5 Cal. 507.

38. The submission of a cause in Court to arbitration operates as a discontinuance of the suit. *Gunter v. Sanchez*, 1 Cal. 45.

39. *Motion for, when waived by the defendant.*—Where a defendant moved for a nonsuit, and afterwards introduced evidence supplying the defect in the plaintiff's testimony, on which the motion for nonsuit was founded: *Held*, that the defendant had thereby waived his motion, and could not insist upon it in this Court. *Ringgold v. Haven*, 1 Cal. 108.

40. *Per BENNETT, J.*—The practice of nonsuit and of demurrer to evidence considered. *Id.*

41. Where a motion for nonsuit was improperly denied, but the defendant then introduced testimony enabling the plaintiff to supply the defect in his case: *Held*, that defendant thereby waived the objection. *Smith v. Compton*, 6 Cal. 24; *Perkins v. Thornburgh*, 10 *Id.* 189.

42. A failure on the part of a plaintiff to make out his case, and error in the Court in refusing to instruct the jury as in case of nonsuit, can be cured by the testimony of the defense. *Winans v. Hardenbergh*, 8 Cal. 291.

43. *Generally.*—Where the complaint in an action on a bill of exchange describes it as payable to the order of A., whereas the bill offered in evidence is drawn payable to B., it is a variance to be taken advantage of by objecting to the evidence, or by a motion of nonsuit. *Farmer v. Cram*, 7 Cal. 135.

44. Where a motion is made for a nonsuit, without stating the grounds upon which it is made, it is not error to overrule the motion. *Kiler v. Kimbal*, 10 Cal. 267.

45. Where plaintiffs, having excepted to the ruling of the Court excluding certain evidence, take, in consequence of such ruling, a nonsuit, with leave to move to set it aside, they do not waive any of their rights as to the exception taken. Objections to the introduction of evidence confined in the Appellate Court, to the grounds taken below. *Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 544.

46. The decision in *Ringgold v. Haven* (1 Cal. 108) that the power of compulsory nonsuit exists, approved. *Mateer v. Brown*, 1 Cal. 221.

47. Costs, by way of indemnity, ought not to be taxed in case of a nonsuit. *Rios v. Leonard*, 5 Cal. 61.

48. Where a bill disclosed that the same subject matter had been litigated between the same parties in a prior suit, and that in the said suit the plaintiff in this suit had set up the same equity which he claims by this bill, the bill was ordered to be dismissed. *Barnett v. Kilbourne*, 3 Cal. 327.

§ 149. *Judgment on the merits, when.*

In every case, other than those mentioned in the last section, the judgment shall be rendered on the merits.

TITLE XI.

CHAPTER II.—*Judgment upon failure to answer.*

SEC. 150. *In what cases judgment may be had upon the failure of the defendant to answer.*

Judgment may be had, if the defendant fail to answer the complaint, as follows:

1st. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the

Clerk of the Court within the time specified in the summons, or such further time as may have been granted, the Clerk, upon application of the plaintiff, shall enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendant, or against one or more of several defendants in the cases provided for in section thirty-two :

2d. In other actions, if no answer has been filed with the Clerk of the Court within the time specified in the summons, or such further time as may have been granted, the Clerk shall enter the default of the defendant ; and thereafter the plaintiff may apply at the first or any subsequent term of the Court for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, be necessary to enable the Court to give judgment, or to carry the judgment into effect, the Court may take the account or hear the proof ; or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the Court may order the damages to be assessed by a jury ; or if, to determine the amount of damages, the examination of a long account be necessary, by a reference as above provided :

3d. In actions, where the service of the summons was by publication, the plaintiff, upon the expiration of the time designated in the order of publication, may, upon proof of the publication, and that no answer has been filed, apply for judgment ; and the Court shall thereupon require proof to be made of the demand mentioned in the complaint ; and if the defendant be not a resident of the State, shall require the plaintiff or his agent to be examined on oath, respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover.

Bancroft's Forms, 564 and 565.

1. A judgment by default before the expiration of the full time will be reversed on appeal. *Burt v. Scranton*, 1 Cal. 416.

2. In proceedings to contest the elections of county officers, the contestant is not permitted to take judgment by default. *Keller v. Chapman*, April T. 1868.

3. Where a complaint fails to state facts sufficient to constitute a cause of action, judgment thereon by default will be reversed on appeal. *Hallook v. Joudin & Co.* Oct. T. 1867.

4. Where one only of several defendants appears and demurs, and the demurrer is sustained, it is error for the Court to give judgment in favor of the defendant who does not appear. *Farnell v. Jackson*, 28 Cal. 105.

44. A default may as well be taken against a municipal corporation as against a private person. The rules of pleading are general; they were designed to embrace all persons, natural or artificial, capable of suing or being sued. *Hunt v. City of San Francisco*, 11 Cal. 250.

5. A judgment by default may be entered against a corporation, incorporated under the laws of two States. *Dodge v. The Mariposa Co.*, Oct. T. 1857.

6. A judgment by default may as well be taken against an administrator as any other party. *Chase v. Swain, Administrator*, 9 Cal. 130.

7. A final judgment by default can properly be rendered upon an unliquidated demand, where the defendant has been notified in the summons of the amount for which the plaintiff will take judgment. *Hartman v. Williams*, 4 Cal. 254.

8. The several counts are distinct causes of action; and the fact that by reason of one of them having been imperfectly stated, no judgment could be rendered on that count, does not affect the right of plaintiff to take judgment on those which are rightly stated. *Hunt v. City of San Francisco*, 11 Cal. 250.

9. A default on a complaint containing special counts defectively stated will support a judgment—the default being a confession of the indebtedness for the causes and on the accounts alleged in the complaint. *Id.*

10. In all cases not within the exception of the statute, an answer without a verification to a complaint duly verified may be stricken out on motion, and application for judgment, as upon default, may be made at the same time. *Drum v. Whiting*, 9 Cal. 422.

11. Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and a judgment by default is regularly entered, the judgment is valid. In this case, the Court denied a trial by jury, and took proof as to title and possession. *Smith v. Billel*, 15 Cal. 23.

12. In suit to recover money due on a promissory note, and to establish a lien for the amount upon certain real estate purchased with money advanced by plaintiff to defendant, and for which advance the note was given, the Clerk entered judgment by default for the amount of the note. Plaintiff, having exhausted his remedies on this judgment, by execution and proceedings supplementary thereto, obtained from the Court a decree for the equitable relief sought in the complaint, to wit: for a lien upon and a sale of the real estate. *Held*, that this decree was *coram non judge*, and void—assuming the judgment by the defendant to be valid. Such judgment, if valid, terminated the controversy, and whatever related to the merits of the case was merged in the judgment. *Kittredge v. Stevens*, 16 Cal. 381.

13. Doubtful whether the Clerk could enter judgment, in an action of this nature, without application to the Court. This point reserved. *Id.*

14. A notice that defendant will move before a Court commissioner to dissolve an attachment issued in a cause is not such an appearance in an action as will authorize the clerk to enter a judgment by default. *Hidden v. Packard*, 28 Cal. 649.

15. A judgment in ejectment awarding damages, rendered on a default, will not be reversed, because it does not appear that the Court examined witnesses upon the question of damages. *Dimick v. Campbell*, 31 Cal. 238.

16. When the defendant demands a bill of particulars, and obtains an order for leave to answer within ten days after the bill is served, which does not contain the items of account, the clerk may enter a default and judgment if the defendant fails to answer within ten days. *Id.* *Providence Tool Co. v. Prager*, 32 Cal. 634. Judgment by Default, see further *ante*, § 147 and notes; also, § 144, Nos. 84-88, 95-97.

17. **Against what defendants, when all not served.**—Where the action is against defendants severally liable, a portion only being served with process, the clerk can, on application of plaintiff, enter judgment, upon default, against the parties served, without regard to the other parties named in the complaint. *Kelly v. Van Austin*, 17 Cal. 564.

18. Where, in an action against defendants jointly, and not severally liable,

a portion only of them are served with process, the clerk cannot, on the application of plaintiff, enter judgment upon default, against the parties served only. A judgment so entered is void. *Id.*

19. If persons are served with summons who are not named in the complaint, either by real or fictitious names, it is error to render judgment against them by default. *Lamping & Co. v. Hyatt et al.*, 27 Cal. 102.

20. No proof of facts required.—Where the complaint is verified, and the defendant fails to answer, plaintiff is entitled to judgment on the complaint without proof of the facts alleged therein. *Tuolumne Redemption Co. v. Patterson*, 18 Cal. 415; *Lick v. Stockdale*, *Id.* 219. See exceptions under subdivisions two and three of this section.

21. Gold coin, judgment in.—If the note sued on is payable in money generally, and the complaint contains a copy of the same, the clerk cannot, after default, enter judgment payable in gold coin, although the complaint prays for such judgment. *Wallace v. Eldridge*, 27 Cal. 495.

22. If the complaint in an action on a judgment avers that the judgment sued on was rendered payable in gold coin, and defendant makes default, the clerk should enter judgment payable in the same kind of money. *Id.* And in an action upon a note payable in gold coin, if the defendant suffers a default, the clerk may enter a judgment against him payable in gold coin. *Harding v. Cowing*, 28 Cal. 212. See further, *post*, § 200, note No. 6-20. [See also as to contracts made prior to the passage of the Specific Contract Act, *Gelkind v. Lewis*, 28 Cal. 47. See *ante*, § 147.] For public revenue, wharfage, etc., in San Francisco, judgment may be rendered in gold coin. *The People v. the Steamer America*, Jan. T. 1868, 23.

23. Judgment entered by order of Court.—Upon facts found, whether by report of referee or special verdict of the jury, the direct action of the Court must be invoked before the judgment can be entered. *Peabody v. Phelps*, 9 Cal. 224.

24. Where a demurrer has been filed, the Clerk cannot enter a default without an order of Court. *Oliphant v. Whiting*, Oct. T. 1867.

25. Where a frivolous demurrer is filed, and no leave is asked to file an answer, it is not error for the Court to enter a default of judgment upon overruling the demurrer. *Seale v. McLaughlin*, 28 Cal. 668.

26. If an answer is filed raising an issue or issues, and a trial is had, and witnesses are sworn and examined, and the Court takes the case into consideration, it cannot then strike out the answer of the defendant and enter his default, and render judgment for plaintiff for the amount claimed in the complaint. *Abbott v. Douglass*, 28 Cal. 295.

A demurrer pending, no default should be entered or judgment taken. See § 345, sub-head: "When judgment will be rendered."

27. What a default cures or admits.—A defective allegation of a fact may be cured by default or verdict, but not so the entire absence of any allegation whatsoever. *Hentsch v. Porter*, 10 Cal. 555; *Barron v. Friak*, 30 Cal. 489; *People v. Reins*, 29 Cal. 137.

28. A default only admits the facts alleged in the complaint. *Id. Harlan v. Smith*, 6 Cal. 173; *McGregor v. Shaw*, 11 *Id.* 47.

29. Where a man is sued by a fictitious name, and the return of the sheriff on the summons shows service on the defendant by his proper name as "John Doe, alias Westfall," a default being entered, judgment may be rendered against the defendant in his true name, Westfall, without proof that Doe and Westfall are the same. *Curtis v. Herrick*, 14 Cal. 117.

30. Where the complaint avers title as administrator, a default admits *it. Id.*

31. The judgment against an administrator, though in the form of a common money judgment by default, is valid, its only effect being to establish the validity of the claim. *Chas v. Swain, Administrator*, 9 Cal. 139.

32. A default on a complaint containing special counts, defectively stated, and also the common counts in *assumpsit*, properly stated, will support a judgment—the default being a confession of the indebtedness for the causes and

on the accounts alleged in the complaint. *Hunt v. City of San Francisco*, 11 Cal. 250.

33. Where the summons has been duly served, a judgment by default amounts to a confession on the part of the defendants of all the material facts in the complaint. *Rove v. Table Mountain Water Co.*, 10 Cal. 441.

34. Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and judgment by default is regularly entered, the judgment is valid. *Smith v. Billett*, 15 Cal. 23.

35. The want of an allegation of actual ouster in a complaint in ejectment is a defect which cannot be cured by a default taken through the mistake or inadvertency of defendant's counsel. *Watson v. Zimmerman*, 6 Cal. 47; *Id.* 174. But see *Paine & Dewey v. Treadwell*, 16 Cal. 243.

36. Waiver of default.—An acceptance by plaintiff's attorney of service of a demurrer, filed by a defendant after his default has been entered, is a waiver of the default. *Hestres, Administrator, v. Clements*, 21 Cal. 425.

37. The clerk acts ministerially.—The clerk of a Court, in entering a judgment after default, acts in a mere ministerial capacity, and cannot render a judgment granting any relief beyond that warranted by the facts stated in the complaint. *Gray v. Palmer*, 28 Cal. 416; *Wallace v. Eldredge*, 27 Cal. (No. 1) 495; *Kelly v. Van Austin*, 17 Cal. 564; *Wilson v. Cleveland*, 30 Cal. 122; *Leese v. Clark*, 28 Cal. 33.

39. When the law declares what the judgment shall be, a judgment on default is not the judgment of the clerk. *Harding v. Cowing*, 28 Cal. 212.

40. Clerk's recitals in the judgment.—It is not necessary for the clerk, in entering up a judgment, to insert therein recitals of his exposition of the preceding facts. *Leese v. Clark*, 28 Cal. 33.

41. The clerk derives all his power in entering a default, without an order of the Court, from the statute, and when he enters a default it must appear that all the facts existed which the law requires to authorize it. *Providence Tool Co. v. Prader*, 32 Cal. 634.

42. Filing answer before default.—An answer filed without leave of Court after the time for answering has expired, but before default has been entered, is not a nullity, but at most, an irregularity. *Bowers v. Dickerson*, 18 Cal. 420.

43. When a judgment by default will be reversed on appeal.—There may be error in a judgment by default, as well as in a judgment rendered upon issue joined in the pleadings and tried by a jury; and in the former, as well as the latter case, the error may be corrected on appeal. *Stevens v. Ross*, 1 Cal. 94.

44. When suit is brought against a person in a county other than that in which he resides, he has thirty (now twenty) days within which to answer, exclusive of the day on which the summons is served; and a judgment by default before the expiration of the full time will be reversed on appeal. *Bart v. Scranton*, 1 Cal. 416.

45. If the summons be radically defective, it will not support a judgment by default. *The People v. Woodlief*, 2 Cal. 241.

46. A judgment by default will be reversed by the Supreme Court, where the record shows that the defendant has not been legally served with process. *Joyce v. Joyce*, 5 Cal. 449.

47. Where judgment by default is entered, in an action against a party for fraudulently converting money of the plaintiff, the summons must have apprised the defendant that, on failure to answer, judgment would be taken against him for the fraud; a mere notice in the summons that a money judgment would be taken will not support a judgment for fraud.—*Per Burnett, J. Porter v. Hermann*, 8 Cal. 519.

48. Where the complaint shows no legal cause of action, a judgment by default can no more be taken than it can be over a general demurrer. *Abbe v. Marr*, 14 Cal. 210.

49. A judgment rendered upon a complaint radically defective, may be treated as a nullity. *Reynolds v. Harris*, 9 Cal. 338.

TITLE XII.

CHAPTER III.—*Of issues, and the manner of their disposition.*SECTION 151. *Issue defined, and their different kinds.*152. *Issue of law, how raised.*153. *Issue of fact, how raised.*154. *Issue of law, how tried.*155. *Issue of fact, how tried ; when issues both of law and fact, the former to be first disposed of.*156. *Clerks shall enter causes on the calendar, and to remain until disposed of.*157. *Parties may bring issue to trial.*158. *Motions to postpone on grounds of absence of evidence, requisites of.*§ 151. *Issue defined, and their different kinds.*

An issue arises when a fact or conclusion of law is maintained by the one party, and is controverted by the other. Issues are of two kinds :

1st. Of law : and,

2d. Of fact.

N. Y. Code, § 248.

§ 152. *Issues of law, how raised.*

An issue of law arises upon a demurrer to the complaint or answer (or) to some part thereof.

¹Amended 1854, 88. N. Y. Code, § 249.§ 153. *Issues of fact, how raised.*

An issue of fact arises,

1st. Upon a material allegation in the complaint controverted by the answer ; and,

2d. Upon new matters in the answer except an issue of law is joined therein.

¹Amended 1854, 88. N. Y. Code, § 250.

1. If the plaintiff, in his complaint in ejectment, avers title in himself, and the defendant interposes a general denial, the respective titles of the plaintiff and defendant are put in issue. *Marshall v. Shafter*, 32 Cal. 176.

§ 154. *Issue of law, how tried.*

An issue of law shall be tried by the Court, unless it be referred, upon consent, as provided in chapter six of this title.

N. Y. Code, § 253.

§ 155. *Issue of fact, how tried; when issues both of law and fact, the former to be first disposed of.*

An issue of fact shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as provided in this act. Where there are issues both of law and fact to the same complaint, the issues of law shall be first disposed of.

N. Y. Code, § 253. As to waiver of trial by jury, see § 179.

1. A trial, is the examination before a competent tribunal, according to the law of the land, of the facts, or a question of law put in issue in a cause for the purpose of determining such issue. *Mulford v. Esudillo*, 32 Cal. 131.

2. Until a decision of the Court has been entered in the minutes, or reduced to writing by the Judge, and signed by him, and filed with the clerk, a case has not been tried. *Hastings v. Hastings*, 31 Cal. 95.

3. Issue of law should be first disposed of.—When there is both a demurrer and an answer to the same complaint, raising both an issue of law and fact, the issue of law should first be disposed of. *Brooks v. Douglass*, 33 Cal. 208.

4. Jury trial in equity cases.—The trial by jury does not necessarily attach to equity cases. *Smith v. Rowe*, 4 Cal. 7.

5. In chancery proceedings, parties are not entitled to a trial by jury, because it would be utterly fruitless. *Walker v. Sedgwick*, 5 Cal. 192; *Cahoon v. Levy*, *Id.* 249.

6. The language of the constitution as to the right of trial by jury, was used with reference to the right as it exists at common law. This right of trial by jury cannot be claimed in equity cases, unless an issue of fact be framed for the jury under the direction of the Court. *Koppikus v. State Capitol Commissioners*, 16 Cal. 248.

7. A Court setting in equity may direct, whenever in its judgment it may become proper, an issue to be framed upon the pleadings, and submitted to the jury. *Curtis v. Sutter*, 15 Cal. 203; *Weber v. Marshall*, 19 *Id.* 447.

8. In chancery cases, the Court below may disregard the verdict of a jury. *Goode v. Smith*, 13 Cal. 84.

9. In an application for a *mandamus* to compel a District Judge to sign a bill of exceptions, which the relator alleges he refuses to do, and where the District Judge in his answer avers that he has signed a true bill of exceptions, and that the one presented by relator is not a true bill: *Held*, that the relator is not entitled to a jury to try the issue. *People v. Judge of the Tenth Judicial District*, 9 Cal. 21.

10. Jury trial.—Where the answer contains both a legal and equitable defense, the Court may first try the equitable defense, and refuse the plaintiff a jury trial, and if the facts warrant it, grant the equitable relief prayed for. *Bodley v. Ferguson*, 30 Cal. 511.

11. Special issues may be framed.—Special issues, framed by the Court according to chancery practice, may be tried by a jury in equity cases; but if the failure to present the issues is the result of plaintiff's own motion, he cannot be allowed to take advantage of it. *Breuster v. Bourz*, 8 Cal. 505.

12. What are proper questions for a jury.—Where the boundaries of a lot of land granted by an Alcalde are uncertain, the jury should determine the true location of the lot in question. *Reynolds v. West*, 1 Cal. 328.

13. The question of the possession and identity of the land should be left to the jury. *Hicks v. Davis*, 4 Cal. 69.

14. What is actual and what is constructive possession in many cases, must be a question of fact for the jury. *O'Callaghan v. Booth*, 6 Cal. 65.

15. The fact of the dedication of the premises by possession as a homestead, was properly submitted to the jury. *Cook v. McChristian*, 4 Cal. 26.

16. Dedication of a street is a conclusion of fact, to be drawn by the jury from the circumstances of each particular case; the whole question as against the owner of the soil being, whether there is sufficient evidence of an intention on his part to dedicate the land to the public as a public highway. *Harding v. Jasper*, 14 Cal. 648.

17. The question of abandonment of a mining claim should be left to the jury upon the facts adduced in evidence. *Waring v. Crow*, 11 Cal. 371.

18. The reasonableness of the use of water is a question for the jury, to be determined by them upon the facts and circumstances of each particular case. *Edmond v. Chew*, 15 Cal. 143.

19. Whether plaintiffs, who had posted notices claiming the water of a certain river, and stating their intention to construct a ditch or flume, and appropriate the water for mining purposes, began their surveys, etc., and prosecuted their work to completion with due diligence, as against parties attempting subsequently to appropriate the water, is a question for the jury, and their verdict, on conflicting testimony, will be conclusive. *Weaver v. Eureka Lake Co.*, 15 Cal. 274.

20. In an action of trespass, the question of damages is a question particularly for the jury. *Drake v. Palmer*, 4 Cal. 11.

21. The fact whether a structure was a public nuisance is a question, not for the Court, but for the jury, to decide. *Gunter v. Geary*, 1 Cal. 467.

22. The question of malice, in an action for malicious prosecution, is one solely for a jury, and the charges must be shown to have been willfully false. *Potter v. Seale*, 8 Cal. 217.

23. In an action for malicious prosecution of a suit on a bill of exchange which was paid, whether the plaintiffs in that suit knew that the bill was in fact paid or not, when they sued, is a question for the jury. *Weaver v. Page*, 6 Cal. 684.

24. Whether such a custom existed, or not, when a custom is about being proven, is a question for the jury to decide. *Panaud v. Jones*, 1 Cal. 500.

25. The question of notice of dissolution of partnership is a fact for the jury, under the charge of the Court. *Rabe v. Wells*, 3 Cal. 151; *Treadwell v. Wells*, 4 Id. 260.

26. Where an action is brought for the balance of an account, and the answer avers payment by a promissory note, and the plaintiff replies that he was induced to receive the note by fraud, the Court held that it was one of the cases where the party was entitled to a trial by jury, and it could not be referred by consent of the parties. *Seaman v. Mariand*, 1 Cal. 336.

27. Questions of law for the Court.

28. Where there is no dispute as to the facts, and the law upon those facts declares a transaction fraudulent, it is not a question for the jury. *Chenery v. Palmer*, 6 Cal. 122.

29. What facts and circumstances constitute evidence of carelessness, is a question of law for the Court to determine. But what particular weight the jury should give to these facts and circumstances, is a matter for the jury. *Gerke v. California Steam Navigation Co.*, 9 Cal. 258. After judgment by default in ejectment, a jury trial cannot be awarded, there being no issue. *Smith v. Billel*, 15 Cal. 28.

30. The question, whether a judgment entered in the Court below, is entered in accordance with the mandate of the appellate Court, is one of law, and not of fact. *Leese v. Clark*, 28 Cal. 33.

31. When a party cannot object that his case was not tried by a jury.—A party cannot go on and try his case before a Judge, without objection, and after he has lost it, complain that the case was not tried by a jury. *Smith v. Drannan*, 13 Cal. 115.

32. As to facts recurring in the presence of the Court.—A Court does not require the verdict of a jury to inform it of facts recurring in the presence of the Court itself. *People v. Judge of the Tenth Judicial District*, 9 Cal. 21.

33. Issue of fact cannot be tried in the Supreme Court.—The Legislature has not provided the Supreme Court with a jury in any case, nor author-

ized it to cause an issue of facts to be made up in this Court and referred to another Court for trial. All issues of fact are to be tried in an inferior Court of this State. *Ex parte the Attorney General*, 1 Cal. 87.

§ 156. *Clerk shall enter causes on the calendar, to remain until disposed of.*

The Clerk shall enter causes upon the calendar of the Court, according to the date of issue. Causes once placed on the calendar for a general or special term, if not tried or heard at such term, shall remain upon the calendar from Court to Court, until finally disposed of.

N. Y. Code, § 258.

§ 157. *Parties may bring issue to trial.*

Either party may bring the issue to trial, or to a hearing, and in the absence of the adverse party, unless the Court for good cause otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.

§ 158. *Motions to postpone a trial for absence of testimony, requisites of.*

A motion to postpone a trial on the ground of the absence of evidence, shall only be made upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The Court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed.

1. **Continuance discretionary with the court.**—The granting or refusing a continuance rests in the sound discretion of the Court. *Musgrove v. Perkins*, 9 Cal. 211.

2. And even when the facts show that the action of the Court below approached nearly to an arbitrary exercise of its discretion, that action will not be reviewed, unless there has been a motion for a new trial, and the application supported by the affidavits of the absent witness, if such affidavits can be obtained; or, if not, then it should be shown to the Court that they cannot be obtained. Unless this be done, this Court will not interfere, in civil cases, with the action of the lower Court. *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 161; *People v. Gaud*, 23 Cal. 156.

3. It is not an abuse of discretion for the Court to refuse a continuance on account of the voluntary absence of the defendant on important business at the time the case has been set for trial, when it does not appear that the busi-

ness could not have been delayed, nor could not have been attended to by some one else, nor that the facts were not in the possession of his attorney. *Wilkinson v. Parrott*, 32 Cal. 102.

4. Where a case in the Twelfth District was set for trial on a particular day, with the knowledge and consent of defendant's attorney, and he then, two or three days before the day of trial, goes to Alameda county to try another case there, a continuance was denied. *Haight v. Green*, 19 Cal. 113.

5. Continuance of case during trial.—A judge has discretionary power, after having heard the testimony and argument of counsel in a case, and announced orally from the bench his finding on the issues in favor of one or the other of the parties, to continue the case until the next term of Court. *Hastings v. Hastings*, 31 Cal. 95.

6. Affidavits must show materiality of evidence.—Where a party applied for a continuance to enable him to take the deposition of an absent witness, and the proof which was designed to be obtained would constitute no defense to the plaintiff's claim, the application was properly rejected. *Hawley v. Stirling*, 2 Cal. 470.

7. A party is bound to know the materiality of testimony, except in the case of surprise at trial. *Berry v. Melsler*, 7 Cal. 418.

8. That the evidence is not cumulative.—Affidavits for a continuance, on the ground of absence of witnesses, should state that the facts expected to be proved by the absent witnesses cannot otherwise be proved. *People v. Quincy*, 8 Cal. 89.

9. An affidavit for continuance, on the ground that a witness is absent from the State, must aver that the party cannot, to his knowledge, prove the same facts by any other witness. *Pierce v. Payne*, 14 Cal. 419.

10. An affidavit for a continuance should state that the facts expected to be proved by the absent witness cannot be proved by any other witness. *People v. Grant*, 23 Cal. 156.

11. An affidavit for a continuance, on the ground of the absence of material witnesses, should state that the absent witnesses are the only persons by whom the party can prove the same facts. It is not sufficient to state that the party has no other witnesses by whom he expects to prove the same facts. *Pope v. Dalton*, 31 Cal. 218.

12. That the application is not made for delay.—An affidavit for a continuance, on the ground of absence of a witness, should state that the testimony wanted is not simply cumulative, and cannot be proven by others, but that the application is not made for delay; the character of the diligence used in trying to obtain the attendance of the witness, whether by exhausting the process of the law or otherwise, should also be stated. *People v. Thompson*, 4 Cal. 240; *People v. Quincy*, 8 Id. 89; *Pierce v. Payne*, 14 Id. 420.

13. Affidavit of merits.—[That a party has a good and substantial cause of action or defense, on the merits. See Rules of Court, San Francisco County, XLI.]

14. That due diligence has been used.—Affidavits for continuance should show due diligence in endeavoring to procure the attendance of witnesses and in preparing the trial. *People v. Baker*, 1 Cal. 404.

15. Absence of evidence is no ground for continuance, unless reasonable diligence has been used to procure it. The party must have resorted to proper legal means for that purpose, or must satisfy the Court that a resort to such means would have been useless. *Kuhland v. Sedgwick*, 17 Cal. 123.

16. When evidence is in a party's own possession, its absence is not excused, on motion for continuance, by showing that through inadvertence he is unable to produce it. *Id.*

17. The answer of defendant was filed May 10th, 1852, and the application for a continuance, to take testimony in New York, was filed June 14th, 1852, during which interval no attempt was made to sue out a commission for the purpose. *Held*, that this is not a sufficient diligence to entitle the party to his application. *Pierson v. Holbrook*, 2 Cal. 598.

18. An affidavit for a continuance, which merely shows that the desired witness resides in another county from that of the place of trial, and that a subpoena has been placed in the hands of the sheriff of the county where the witness resides, and has been returned not served on the witness, does not show sufficient diligence to entitle the defendant to a continuance. *People v. Williams*, 24 Cal. 31.

19. Admissions made to prevent a continuance.—The plaintiff, to avoid the continuance, admitted that a witness would testify to certain facts set up in the affidavit, and the trial proceeded. This affidavit, therefore, became evidence, but not conclusive proof of its contents. *Blankman v. Vallejo*, 15 Cal. 645.

20. Where it is admitted, for the purpose of preventing a continuance, that the several witnesses named would, if present, respectively testify as stated in the affidavit, and that their testimony should be considered as actually given on the trial, or as offered and overruled by the Court as improper, the testimony thus assumed was offered, and for all the purposes of the case must be deemed as actually before the Court. *Boggs v. Merced Mining Co.*, 14 Cal. 358.

21. Surprise as a ground for continuance.—If defendants were surprised by an amendment, and found it necessary to assume a different line of defense in consequence of it, they would have been entitled to a continuance to prepare for their defense. *Polk v. Coffin*, 9 Cal. 58.

22. A refusal to grant a continuance for the absence of witnesses or counsel, under circumstances showing that the party or his counsel was surprised as to the time or place of holding Court, is error. *Ross v. Austill*, 2 Cal. 183.

23. If a party is taken by surprise by an extension of time to take testimony before a referee, and by the testimony thereby introduced, he should apply for a continuance for that reason in order to procure further evidence on his side, or he can not have the benefit of the point in the appellate Court. *People v. Holden*, 28 Cal. 129.

24. Discovery of new evidence.—It is not good ground for a new trial that the defendant discovered material testimony at too late a period to produce the same at the trial. It would, however, be good ground on which to base a motion for continuance. *Barry v. Meisler*, 7 Cal. 418.

25. General decisions.—A mistaken advice of counsel to his client, not to prepare for trial, is no ground for a continuance. *Musgrove v. Perkins*, 9 Cal. 211.

26. An agreement of counsel for the continuance of a cause, not reduced to writing, will not be regarded by the Court. *Peralta v. Marica*, 3 Cal. 187.

27. A party who is unprepared for trial at the time of the calling of the case, should move for a continuance; and if he fails to do this, he waives his want of preparation and cannot afterwards, when judgment has gone against him, move for a new trial on this ground. *Turner v. Morrison*, 11 Cal. 21.

28. Courts are extremely liberal and indulgent in granting adjournments, and they are seldom or never appealed to in vain. *Id.*

29. In criminal cases, on a motion for continuance by defendant, on the ground of the absence of a material witness, based on a sufficient affidavit, the agreement of the District Attorney that the witness, if present, would have deposed as averred in defendant's affidavit, is not sufficient to warrant overruling the motion. *People v. Diaz*, 6 Cal. 249.

TITLE XIII.

FORMATION OF THE JURY.

CHAPTER IV.—*Trial by Jury.*

- SECTION 159. Jury, how drawn, and how many to consist of.
 160. Jury to be sworn.
 161. Challenges, each party entitled to four peremptory challenges.
 162. Grounds of challenges.
 163. To be tried by the Court. Witnesses may be examined.

§ 159. *Jury, how drawn, and how many to consist of.*

When the action is called for trial by jury, the clerk shall prepare separate ballots containing the names of the jurors summoned who have appeared and not been excused, and deposit them in a box. He shall then draw from the box twelve names, and the persons whose names are drawn shall constitute the jury. If the ballots become exhausted before the jury is complete, or if from any cause a juror, or jurors, be excused or discharged, the sheriff shall summon, under the direction of the Court, from the citizens of the county and not from bystanders, so many qualified persons as may be necessary to complete the jury. The jury shall consist of twelve persons, unless the parties consent to a less number. The parties may consent to any number not less than three. Such consent shall be entered by the clerk in the minutes of the trial.

1. *Court may excuse jurors.*—The Court may, of its own motion, for any good reason, excuse a qualified juror from sitting on the panel in a criminal case; and this will not be error, if the defendant is tried by a jury of lawful men. *People v. Arceo*, 32 Cal. 40.

2. A party on trial is entitled to a lawful jury, but is not entitled, as a matter of absolute right, to have the first juror who is called and possesses all the statutory qualifications, sit in his case. *Id.*

3. *Qualifications of jurors.*—A person shall not be competent to act as juror unless he be: first, a citizen of the United States; second, an elector of the county in which he is returned; third, over twenty-one and under sixty years of age; and fourth, in the possession of his natural faculties; fifth, nor shall any person be competent to act as a juror who has been convicted of a felony, or misdemeanor, involving moral turpitude. Stat. 1853, 107.

4. A juror must be an elector of the county in which he is returned, and have resided in the county thirty days. *Sampson v. Schaffer*, 3 Cal. 107.

5. Residence depends upon intention as well as fact, and mere inhabitancy for a short period, against the intention of acquiring a domicile, would not make a resident, within the meaning of the law, so as to constitute an elector. *People v. Peratta*, 4 Cal. 175.

6. A citizen of the State, who has resided in the county fourteen days, and then been absent some months from the State, with the intention of returning to reside in the county, and has returned and resided some fourteen days in the county, is a competent juror, his residence dating from the first residence, and not from his return. *People v. Stonecifer*, 6 Cal. 410.

7. The proviso of the act concerning jurors, excepting the counties of Monterey, etc., from the provisions of the act, which requires the juror to understand the language in which the proceedings of the Court are had, does not deprive the Court in one of the excepted counties of the power to excuse jurors of its own motion, when those on the same panel speak several different languages. *People v. Arceo*, 32 Cal. 40.

8. Such proviso can have effect by construing it to mean that a want of sufficient knowledge of the language in which the proceedings of the Court are had, is not a legal disqualification of a juror, but that the Court may require, in its discretion, all the jurors on the same panel to understand the same language. *Id.*

9. In actions against a sheriff.—When the sheriff is a party to the action, the Court may order the cause tried by a special jury, to be summoned by the coroner. *Pacheco v. Hunsacker*, 14 Cal. 120.

10. In trespass against a sheriff, the Court below, on plaintiff's motion, may order a special jury to try the case, instead of the regular panel. The sheriff being interested, ought not to summon a jury. And there being no coroner, an alisor may be appointed to summon a jury. *Id.*

11. Objections to a juror, how waived.—A party who accepts a juror, knowing him to be disqualified, is estopped from afterwards availing himself of such disqualification. *People v. Stonecifer*, 6 Cal. 411.

12. Affidavits to the incompetency of a juror must be embodied in a bill of exceptions, or they will not be examined by the appellate Court. *Id.*

13. Objections to panel.—An objection is not well taken to the panel of a trial jury, on the ground that such jury was summoned by order of the Court after the commencement of the term. *People v. Rodriguez*, 10 Cal. 59.

14. Unless an irregularity complained of in the formation of a jury goes to the merits of the trial, or leads to the inference of improper influence upon their conduct, their verdict should not be disturbed. *Thrall v. Smiley*, 9 Cal. 538.

15. The objection to the qualification of a juror, that his name was not on the venire returned by the sheriff, comes too late after the verdict. The objection, if it had any validity, should have been urged at the trial. *Id.*

16. No regular panel having been drawn and summoned, the Court ordered thirty-six jurors to be summoned, which was done; and twenty-seven of them appearing, the Court caused their names to be put in a box, from which twelve were drawn to constitute a trial panel: Held, not to be a ground for challenge to the whole panel. *People v. Stuart*, 4 Cal. 225.

§ 160. Jury to be sworn.

As soon as the jury is completed, an oath or affirmation shall be administered to the jurors, in substance, that they each of them will well and truly try the matter in issue between ——— the plaintiff, and ——— the defendant, and a true verdict render according to the evidence.

§ 161. Challenges; each party entitled to four peremptory challenges.

Either party may challenge the jurors, but when there are several parties on either side, they shall join in a challenge before it can be made. The challenges shall be to individual

jurors, and shall either be peremptory, or for cause. Each party shall be entitled to four peremptory challenges.

1. Where several defendants are tried together, they are not allowed to sever their challenges, but all must join therein. This applies as well to peremptory as to challenges for cause. *People v. McCalla*, 8 Cal. 303.

§ 162. 'Grounds of challenge.

Challenges for cause may be taken on one or more of the following grounds :

1st. A want of any of the qualifications prescribed by statute to render a person competent as a juror.

2d. Consanguinity or affinity, within the third degree, to either party.

3d. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party, or being a member of the family of either party, or a partner in the business with either party, or being security on any bond or obligation for either party.

4th. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action.

5th. Interest on the part of the juror in the event of the action or in the main question involved in the action, except the interest of the juror as a member or citizen of a municipal corporation.

6th. Having formed or expressed an unqualified opinion or belief as to the merits of the action.

7th. The existence of a state of mind in the juror evincing enmity against, or bias to, either party.

'Amended 1860, 302; applicable to Justices' Courts.

1. **General decisions.**—A general challenge of a jury for cause, without specification of the particular ground, is insufficient. The statute enumerates several different grounds for which such challenge may be taken, and a designation of the one upon which any particular challenge rests is essential to its consideration by the Court. It is not sufficient to say: "I challenge the juror for cause," and then stop. *Paige v. O'Neal*, 12 Cal. 483.

2. That a jury has just tried a case involving the liability of defendant for a similar cause of action, depending on the same general considerations, does not render the jury incompetent to sit in the subsequent case. *Algier v. Steamer Maria*, 14 Cal. 167.

3. In impaneling a jury each party has a right to put questions to a juror, to show not only that there exist proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether he will make a peremptory challenge. *Watson v. Whitney*, 23 Cal. 375.

4. **Fourth subdivision.**—Where, in a civil case, Taylor, a juror, had been accepted by both parties, and subsequently, during the examination of another

juror, the fact came out that there had been a former trial of forcible entry and detainer for the same ground now in dispute, and Taylor, then, of his own accord, stated that the title to the ground had been spoken of in the forcible entry case, and that his mind was made up as to the title, and the plaintiffs thereupon challenged Taylor for cause, and the Court excused him, defendants resisting, on the ground that it was too late: *Held*, that there is no error; that where the Court below exercised its discretion in excusing a juror to attain justice, this Court would interfere with great reluctance. *Grady v. Early*, 18 Cal. 108.

5. *Sixth subdivision*.—That a juror has read or heard a statement of the facts of a case, does not, of itself, disqualify him, under the statute; for he may not have formed or expressed an "unqualified opinion." A mere impression or suspicion derived from such reading or hearing, does not disqualify. The juror must have reached a conclusion like that upon which he would be willing to act in ordinary matters. *People v. Reynolds*, 16 Cal. 128.

6. In an action of ejectment, a juror who has formed an opinion adverse to the validity of title under which defendants claimed, is an incompetent juror. *White v. Moses*, 11 Cal. 68.

7. A verdict of a jury will not be set aside on the ground that one of the jurors "knew and was aware of the circumstances connected with the affair," the subject matter of the suit, where no objection to him was raised until after the verdict was rendered, and it not appearing that he had formed or expressed an opinion before the trial, or was in any way biased in favor of plaintiff. *Lawrence v. Collier*, 1 Cal. 37.

8. *Seventh subdivision*.—The law contemplates that every juror who sits in a cause shall have a mind free from all bias or prejudice of any kind; and if a juror is prejudiced in any manner, he is not a proper person to sit in the jury box. *People v. Reyes*, 5 Cal. 347.

9. Prejudice is a state of mind which, in the eye of the law, has no degrees. *Id.*

10. A juror being challenged for bias, was examined before triers, and asked the following questions: 1st. Are you not a member of a secret and mysterious order, known as and called Know Nothings, which has imposed on you an oath or obligation, beside which an oath administered to you in a Court of Justice, if in conflict with that oath or obligation, would be by you disregarded? 2d. Are you a member of any secret association, political or otherwise, by your oaths or obligations to which any prejudice exists in your mind against Catholic foreigners? 3d. Do you belong to any secret political society, known as and called by the people at large in the United States, Know Nothings? and if so, are you bound by an oath, or other obligation, not to give a prisoner of foreign birth, in a Court of Justice, a fair and impartial trial? *Held*, that the Court erred in ruling out these questions. *Id.*

11. If the juror has taken such oaths as are referred to, he was grossly unfit to sit as a juror. *Id.*

§ 163. *To be tried by the Court. Witnesses may be examined.*

Challenges for cause shall be tried by the Court. The juror challenged, and any other person, may be examined as a witness on the trial of the challenge.

TITLE XIV.

CONDUCT OF THE TRIAL.

- SECTION 164. Proceedings in case a juror become sick.
 165. Charge to the jury ; Court shall furnish in writing, upon request, the points of law contained therein.
 166. Jury may decide in Court, or retire for deliberation. Duty of the officer in charge.
 167. Jury may take with them certain papers.
 168. May come into Court for further instructions.
 169. When jury are prevented from giving verdict the cause may be again tried.
 170. While jury are absent the Court may adjourn from time to time. Sealed verdict. Final adjournment discharges the jury.
 171. The jury having agreed upon a verdict, shall declare the same.
 172. Informal or insufficient verdict may be corrected under advice of the Court.
 173. Verdict shall be recorded in full in the minutes.

§ 164. *Proceedings in case a juror become sick.*

If, after the impanneling of the jury, and before verdict, a juror become sick, so as to be unable to perform his duty, the Court may order him to be discharged. In that case the trial may proceed with the other jurors, or a new jury may be sworn, and the trial begin anew ; or the jury may be discharged, and a new jury then or afterwards impaneled.

1. The withdrawal of a juror and the continuance of a case thereby, is no ground for reversing a judgment subsequently obtained. *Benedict v. Cozens*, 4 Cal. 381.

§ 165. *Charge to the jury ; Court shall furnish in writing, upon request, the points of law contained therein.*

In charging the jury the Court shall state to them all matters of law which it thinks necessary for their information in giving their verdict ; and if it state the testimony of the case, it shall also inform the jury that they are the exclusive judges of all questions of fact. The Court shall furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge ; or shall sign, at the time, a statement of such points prepared and submitted by the counsel of either party.

2. Instructions should conform to the pleadings and the facts.—Instructions in civil and criminal cases should be drawn with reference to the case as made by the evidence. *People v. Roberts*, 6 Cal. 217.

3. An instruction of the Court to the jury must be adapted to the facts of the case. *People v. Honshell*, 10 Cal. 87; *People v. Byrnes*, 30 Cal. 206.

4. Where no question of jurisdiction of Courts is raised by the pleadings, it is error to instruct the jury "that if they believe a certain fact they must find for the defendant, as the existence of that fact will establish a want of jurisdiction over the case," because, as the pleadings stand, such a verdict is a complete bar to another action, to which the plaintiff is entitled in another Court, if the verdict against him was rendered in pursuance of such an instruction. *Fairbanks v. Woodhouse*, 6 Cal. 483.

5. Questions of fact must be entirely left to the jury.—It is error for the Court to charge the jury as to a question of fact, or as to the weight of evidence. *Battersby v. Abbott*, 9 Cal. 565; 4 *Id.* 260.

6. The constitutional right of the Court "to state the testimony" to the jury would hardly authorize a Judge to express his opinion as to its effect. *Seligman v. Kalkman*, 8 Cal. 216.

7. An instruction to the jury "to find for the defendant, as plaintiff has failed to prove a redemption," is clearly erroneous. The question of redemption was the main point in issue. *Battersby v. Abbott*, 9 Cal. 565.

8. Where, in a suit for the value of horses alleged to have been purchased by B., it was proven among other things that the horses were purchased for the use of the Overland Mail line, and the Court instructed the jury that under the evidence, B. was to be considered as sole proprietor of that line. *Held*, that the instruction was wrong, because violating the constitutional provision prohibiting Judges from charging juries with respect to matters of fact; but *Held*, further, that as no other conclusion could be arrived at from the evidence, the error could not have prejudiced defendant, and therefore is not ground for reversal. *Pico v. Stevens*, 18 Cal. 376.

9. It is the province of the jury, unaided by the Court, to say whether a fact is proved or otherwise. *People v. Dick*, 32 Cal. 213.

10. Questions for the Court should not be left to the jury.—It is error for the Court to submit to a jury the question of the legal effect of written documents offered in evidence during the trial. *Carpentier v. Thirston et al.*, 24 Cal. 268.

11. It is for the Court to determine whether letters which have passed between parties constitute an agreement between them. *Luckhart v. Ogden*, 30 Cal. 548.

12. Whether an agreement between parties amounts to an extension of time for the performance of a former contract between them, and if so, what time, are questions of law for a Court and not of fact for a jury. *Id.*

13. When a contract is to be performed within a reasonable time, the question, "What is a reasonable time?" is one of law to be determined by the Court from the facts established. *Id.* See *post*, Nos. 62, 63, 80.

14. Instruction to jury as to admitted facts.—In this case, the answer being insufficient as a denial of the allegations in the complaint, and the Court having instructed the jury to find for plaintiff: *Held*, that the instruction was right—no evidence being required on the part of plaintiff. *Kuhland v. Sedgwick*, 17 Cal. 123.

15. When certain allegations of fact in the complaint are admitted in the answer, an instruction by the Court to the jury that the admitted facts will be taken by them as true, and that they will so find for plaintiff, is not an instruction to the jury to find a verdict in favor of plaintiff, except as to the facts so admitted. *Blood v. Light*, 31 Cal. 115.

16. Instruction as to the legal effect of evidence.

17. Case where Court below instructed the jury that the facts showed no valid sale of personal property for want of such change of possession as the Statute of Frauds requires; and the Supreme Court sustained the instructions. *Ford v. Chambers*, 19 Cal. 143.

18. **The instruction should embrace all the testimony.**—Where the plaintiff's case does not depend alone on the evidence mentioned in the instruction requested by the defendant, it was properly refused. *Pearson v. Snodgrass*, 5 Cal. 479.

19. Where a Court instructs a jury upon what state of facts they may find verdict for a party, the instruction should include all the facts in controversy material to the right of plaintiff, or defense of defendant. *Gallagher v. Williamson*, 23 Cal. 331.

20. **Facts not proven, should not be assumed.**

21. The jury are the exclusive judges of the facts, and it is erroneous for the Court to assume, in its instructions to the jury, that a certain fact exists, and then submit to them the question whether or not it does exist. *Cahoon v. Marshall et al.*, 25 Cal. 198.

22. The facts are to be found by the jury from the evidence, and it is error for the Court in its charge to assume, as proven, a fact which is in issue. *Cladwell v. Center*, 30 Cal. 539.

23. **Court should give or refuse instructions as asked for.**—The Court should give or refuse instructions to the jury as asked for, and though the phraseology may be modified to make it more intelligible, yet the sense must not be altered. *Conrad v. Lindley*, 2 Cal. 172; *Jamson v. Quiny*, 5 Id. 491; *Russell v. Amador*, 3 Id. 403.

24. **Held**, that where an instruction asked by defendant, if given entire, would have been erroneous, the Court was not bound to separate the concluding clause and give that by itself, and was therefore right in refusing the instruction. *Smith v. Richmond*, 19 Cal. 476.

25. **The Court may modify or refuse defective instructions.**—Counsel may propose instructions to the Court, but the Court is not compelled to give or refuse them as asked. If, in the opinion of the Judge, the proposed instructions are defective in form of expression, or erroneous in law, he may modify them in either particular, and give them to the jury in their modified form, or he may refuse them altogether. *Boyce v. California Stage Co.*, 25 Cal. 470.

26. **Instructions with a qualification.** *Lawrence v. Fulton*, 19 Cal. 683; *Id.* 476.

27. **Conflicting instructions.**—If the Court gives an instruction, correctly stating the law, and afterwards another nullifying the first, the judgment will be reversed. *People v. Campbell*, 30 Cal. 312.

28. **Instructions as to abstract questions of law.**—It is not error for a Court to refuse an instruction asked, stating an abstract or general proposition of law when it has already so charged the jury as to embrace such proposition, or so much of it as is applicable to the case. *Fairchild v. The California Stage Co.*, 13 Cal. 599.

29. Where a party asks an abstract proposition of law, by way of instruction to a jury, he takes the risk of its being correct in all its parts. *Thompson v. Paige*, 16 Cal. 77.

30. The Court should refuse to instruct the jury on abstract questions of law. *Fowler v. Smith*, 2 Cal. 39; *Id.* 387; *Branger v. Chevalier*, 9 Id. 353.

31. It is not incumbent on the Court to instruct the jury upon mere abstract questions of law, irrelevant to the case, as serving only to bewilder and mislead them from the true issue to be determined. *Fowler v. Smith*, 2 Cal. 45.

32. Whether an instruction, giving the general rule, without qualification, be proper or not, depends on the facts in proof, and the charge would be right or wrong according to the circumstances of the given case. *People v. Arnold*, 16 Cal. 482.

33. **The Court may refuse to give instructions already substantially given.**—The Court may refuse to give an instruction, on the ground that it has been already substantially given by the Court. *Belden v. Henriquez*, 8 Cal. 87.

34. If an instruction be refused, for the reason that it has been already given, the reason of the refusal should be stated so as not to mislead the jury. *People v. Ramirez*, 13 Cal. 172.

35. Where equivalent instructions are given and refused, the Court should

place its refusal on the ground that equivalent instructions were given. Unless this is done, the jury may be misled. *People v. Hurley*, 8 Cal. 390.

36. A correct charge by the Court upon a matter in issue, cures a refusal by the Court to give a correct charge upon the same point asked by one of the parties. *Davis v. Perley*, 30 Cal. 630.

37. It is not error to refuse an instruction asked when the same has already been given in substance. *People v. King*, 27 Cal. 509.

38. If the Court has already given the law correctly to the jury upon a given point, it is not error to refuse a second instruction upon the same point. *People v. Williams*, 32 Cal. 280.

39. Instructions are properly refused when not warranted by the pleadings. *Thompson v. Lee*, 8 Cal. 275; or,

40. When there is no evidence on the question of fact embraced in it. *People v. Hurley*, 8 Cal. 390; *Tompkins v. Mahoney*, 32 Cal. 231; or,

41. When there is only such slight evidence as is plainly insufficient to establish it, it is proper for the Court to instruct the jury to that effect, and withdraw the point from their consideration. *Selden v. Cashman*, 20 Cal. 56; or,

42. Which assumes a certain fact to exist, respecting which evidence has been introduced before the jury. *Preston v. Keys*, 23 Cal. 193.

43. It is not error in a Court to refuse to give to the jury an instruction which embraces a question which came properly before the Court, and not before the jury. *Branger & Driard v. Chevalier*, 9 Cal. 353.

44. A Court is not bound to give an instruction erroneous on its face, even though the error be insufficient to reverse the judgment. *Visher v. Webster*, 13 Cal. 58.

45. No instructions should be given to a jury which are not predicated upon some theory, logically deducible from at least some portion of the testimony. *People v. Sanchez*, 24 Cal. 28.

46. It is not error for the Court to refuse to instruct a jury, "that where two innocent parties must suffer, that party who had been the cause of another's loss must lose." *Davis v. Davis*, 26 Cal. 44.

47. Erroneous instruction, when it will be disregarded.—See *Pico v. Stevens*, 18 Cal. 376; *Brooks v. Crosby*, 22 Cal. 42; presumed to be erroneous, 24 Cal. 339.

48. Erroneous admission of evidence cured by instruction.

49. If the Court errs in the admission of testimony, during the trial, but afterwards instructs the jury to disregard such testimony, the error is not sufficient to entitle the party objecting to the testimony to a new trial. *Union Water Co. v. Cravy*, 25 Cal. 507.

50. Case fairly submitted will not be disturbed.—Where the charge of the Court, taken as a whole, fairly submitted the case to the jury, the judgment will not be disturbed because some instructions were refused, which could properly have been given, or that some of those given are subject to verbal criticism. *Brooks v. Crosby*, 22 Cal. 42.

51. Erroneous rulings.—A jury should make up their verdict from the facts according to the law as given to them by the Court; and it seems that it is improper for a Court to charge the jury "to take into consideration all of the facts and do equal justice between the parties," inasmuch as an instruction so general in its terms may mislead them. *Per HASTINGS, C. J. Kelly v. Cunningham*, 1 Cal. 365.

52. The Court has no right to charge the jury in regard to conclusions of fact. *Treadwell et al. v. Wells et al.*, 4 Cal. 260.

53. Instructions, when to be handed to the court.—A rule of Court requiring counsel to file and submit to the Court any instructions they may offer, before the argument is closed, to the jury, does not operate where the cause is submitted without argument. *Tinney v. Endicott*, 5 Cal. 102.

54. If there is a rule of the District Court requiring instructions to be handed to the Judge by a certain time in the progress of the trial, it is not error for the Court to refuse to give instructions not handed to the Judge in time. *Waldie v. Dall*, 29 Cal. 556.

[Instructions must be presented to the Court directly after the close of the evidence and before any argument is made to the jury. Rule XLIV for San Francisco.]

55. Instructions asked, and refused, should not be read in the hearing of the jury. *Waldie v. Doll*, 29 Cal. 555.

56. Judge may read from memoranda.—It is not error for the Judge, in stating the testimony to the jury, to read a memorandum of testimony taken by another person, instead of using his own minutes or making the statement from recollection. *People v. Boggs*, 20 Cal. 432.

57. Actions of ejectment.—In an action for the recovery of a portion of a tract of land, both parties relying on possession, and the defendant proving a prior possession by actual inclosure of the entire tract, it was error to instruct the jury that the defendant's possession was not valid, unless in conformity with the Pre-emption Laws of the United States, or the Possessory Laws of this State. *Bradshaw v. Treat*, 6 Cal. 172.

58. When a private survey is admitted as a diagram, but not as evidence, the Court should clearly explain to the jury the precise purpose and effect of its admission. *Rose v. Davis*, 11 Cal. 133.

59. An instruction to the jury that they must take the grant and map together, and if they believe the land in controversy within the grant, as explained by the map, they will find for the plaintiff. *Held*, to be correct. *Ferris v. Coover*, 10 Cal. 589.

60. It is error for the Court to instruct the jury that before the plaintiff can recover, the evidence must specifically fix and establish the eastern boundary line of the grant under which plaintiff claimed, when it appears from the evidence that the land in controversy is within that boundary line. The precise location of that line is of no moment. *Seaward v. Malotte*, 15 Cal. 307.

61. Where the defendants deny ownership in plaintiff, and set up ownership in themselves, it is not error to instruct the jury that the only question for them to determine is as to who has the better right to the premises. Such instruction does not imply that plaintiffs can recover, even if they do not establish, *prima facie*, a title. *Buenius v. Coffee*, 14 Cal. 91.

62. In ejectment, where the title is of record and wholly documentary, the Court may declare the effect of the papers offered by plaintiff, and instruct the jury that plaintiff has made out his title, if they believe the land to be within the boundaries of a grant under which plaintiff claims. *McGarvey v. Little*, 16 Cal. 27.

63. In ejectment, the Court having admitted in evidence, as sufficiently proven, the mesne conveyances through which plaintiff traced title—the defendants being mere trespassers—charged the jury "that the written evidence of title, together with the admissions of the parties, authorized them to find for the plaintiff, since the execution of the papers had been passed upon by the Court." *Held*, to be no objection to this instruction, that it does not leave the execution and delivery of the conveyances to the jury; that the sufficiency of their execution was a matter addressed solely to the Court, and that—no question being raised during the trial as to their delivery and no evidence being offered to rebut the presumption of delivery arising from their possession by plaintiff—the instruction amounted only to an announcement of the law as to the effect of the conveyances and of the admissions of the defendants. *Stark v. Barrett*, 15 Cal. 361.

64. *Held*, further, that if it had been objected to this instruction that it took from the jury the question of damages for rents and profits, the objection would have been tenable; but that, no such objection being taken, the point must be regarded as waived, although the jury awarded such damages. *Id.*

65. Ejectment for land as a homestead. The husband alone had executed a deed to defendant. There was evidence tending to show that the premises were never occupied by plaintiffs with the intention of making them the homestead, and also evidence tending to prove an abandonment of their occupancy, and a residence on other property as that of the family. The Court below submitted a series of questions to the jury for a special verdict, the first of which was: Did the plaintiffs ever dedicate and set apart the real estate described in the

complaint as a homestead, by living upon it with the intention to so dedicate it? and told the jury if they answered this question in the negative, the answer would constitute their entire verdict; but if they found in the affirmative, they should then proceed to answer the other questions. *Held*, that such direction was proper, as a negative answer to this question was conclusive against a recovery, and that such directions are convenient in practice and no abuse of discretion. *Broadus v. Nelson*, 16 Cal. 79.

66. Where, in ejectment, plaintiff asked the Court to instruct the jury "that lapse of time does not constitute an abandonment, but that it consists in a voluntary surrender and giving up of the thing by the owner, because he no longer desires to possess it, or thereafter to assert any right or dominion over it;" and the instruction was given with the qualification that lapse of time constitutes the material element in the question of abandonment: *Held*, that it would be more exact to say that lapse of time constitutes a material element to be considered in deciding the question of abandonment, but that the instruction given and the qualification are, in connection, the same in effect. *Lawrence v. Fulton*, 19 Cal. 683.

67. Actions concerning mining claims.—In an action for diverting water from plaintiff's ditch—plaintiff and defendants both having ditches supplied from the same stream, the plaintiff's rights being prior and paramount—defendants asked the Court to instruct the jury that if defendants had brought water from foreign sources and emptied it into the stream with the intention of taking it out again, they had the right to divert the quantity thus emptied in, less such amount as might be lost by evaporation and other like causes. The instruction was given with the explanation that they could not so reclaim the water as to diminish the quantity to which plaintiff was entitled as prior locator. *Held*, that the explanation was proper, the concluding words of the instruction being too general and indefinite. *Burnett v. Whitesides*, 15 Cal. 35.

68. In an action for diverting water from the plaintiff's ditch, and where both parties claimed, in part, the waters of the same stream: *Held*, that the following instruction was properly given by the Court to the jury: "That defendant is not liable for any deficiency of water in plaintiff's ditch, unless he was diverting from Rabbitt's creek more water than he was entitled to at the precise time that such deficiency existed." *Brown v. Smith*, 10 Cal. 508.

69. Also, where the Court instructed the jury that if they believed that defendant's ditch was so filled with tailings, during the period of the alleged injury, that it was incapable of directing the waters of the creek, then plaintiff cannot recover. *Id.*

70. In an action for a mining claim, when the defendants asked for an instruction to the jury "that if the plaintiff had abandoned the claim, and did not intend to return and work it before the commencement of the suit," and the Court gave the instruction "subject to the seventeenth section of the Statute of Limitations:" *Held*, that the qualification to the instruction was error. *Davis v. Butler*, 6 Cal. 510.

71. Where the Court instructed the jury, in such action, that "where an abandonment is sought to be established by the act of the party, the intention not to return, his abandonment is as complete, if it exist for a minute or a second, as though it continued for years; but if he left with the intention of returning, he might do so at any time within five years, provided there was no rule, usage or custom of miners of such a notorious character as to raise a presumption of an intention to abandon:" *Held*, that the question of abandonment was fairly left to the jury. *Waring v. Crowe*, 11 Cal. 366.

72. In suit for damages for an entry upon mining claims, and for perpetual injunction, etc.: *Held*, that it was error for the Court below to charge the jury that if they believed no injury or damage was done by defendants to plaintiffs, they would find for defendants; that such charge was calculated to mislead, inasmuch as the law presumes damages from a trespass, and under the charge the jury might have decided the case upon this want of proof of plaintiff's damages, instead of absence of proof of their title. *Atwood v. Fricott*, 17 Cal. 37.

73. In an action to recover possession of a mining claim, where the defense is an abandonment of the claim by the plaintiff, the judgment roll in action

brought by the plaintiff against third parties to recover possession of the same ground, and in which plaintiff recovered judgment, is admissible in evidence to rebut the presumption of abandonment. *Richardson v. McNulty*, 24 Cal. 339.

74. In such case the Court should guard the jury by proper instructions from giving the judgment any weight as evidence, except upon the question of abandonment. *Id.*

75. If an erroneous instruction is given to a jury, the judgment will be reversed, unless it appear from the record that the appellant was not prejudiced thereby. *Id.*

76. Various actions affecting real estate.—It was error for the Court to instruct the jury "that where a person injuriously slanders the title of another, malice is presumed." It was also error to instruct them that fraud could not be presumed, but may be established by circumstances, but not of a light character; the circumstances must be of a most conclusive nature. *McDaniel v. Baca*, 2 Cal. 326.

77. Where the complaint does not charge the mortgagee in possession with negligence or improper conduct in the leasing the mortgaged premises, but requires him to account for the rents he actually received, it is proper in the Court to refuse to instruct the jury that he might have leased the property differently, and to charge him with what he might have received if so leased. *Bankam v. Rowe*, 2 Cal. 387.

78. In an action for use and occupation, the Court was asked to instruct the jury, "that it was necessary, to enable the plaintiff to recover, that he should show that the defendant used and occupied the premises by the permission of the plaintiff, and if the jury believed the defendant used and occupied the same against the will of the plaintiff, that they must find a verdict for the defendant," which the Court refused. *Held*, that in this the Court erred. *Sampson v. Shaeffer*, 3 Cal. 196.

79. In an action for injuries to a garden, occasioned by the breaking of a reservoir, the Court instructed the jury that, to entitle plaintiff to recover, it must appear that the breaking of the reservoir resulted from the gross negligence of defendants; and then proceeded to explain that defendants must have taken the same care of their reservoir, and of the water in it, as they would have done, being prudent men, had the garden of plaintiff been their property; and that otherwise, they had been guilty of gross negligence, and were liable in damages: *Held*, that although the instructions without the explanation was wrong, still with the explanation it was right, and could not have misled the jury. *Todd v. Cochrill*, 17 Cal. 97.

80. Actions involving questions of fraud.—Where there is no dispute as to the facts, and the law upon those facts declares a transaction fraudulent, it is not a question for the jury. The Court, in such case, may direct the jury how to find or set aside the verdict, if they find to the contrary. *Chenery v. Palmer*, 6 Cal. 119.

81. It was error in the Court below to refuse to instruct the jury that if they believed the receipt, specified in the deed for \$3,000, was obtained by fraud, they were authorized to find for the defendant. No case in the history of jurisprudence will sustain that ruling. *McDaniel v. Baca*, 2 Cal. 326.

82. Upon the issue of fraud, in an application of an insolvent to be discharged from his debts, where it was alleged that the applicant had made and recorded a sham deed of his property shortly before his application, which property was not included in his schedule: *Held*, that it was error for the Court to instruct the jury, "that to find the charge of fraud sustained, they must believe the deed made with the intent to defeat, hinder, or delay creditors, and to have been actually delivered to the grantees; that proof of record was no proof of delivery," etc. The fraud is as complete without the delivery as with it. *Fisk v. His Creditors*, 12 Cal. 281.

83. It is error to instruct a jury, in a civil case of imputed fraud, that if they have a doubt of the guilt of the party charged, they must find in his favor. Issues of fact in civil cases are determined by a preponderance of testimony, and this rule applies as well to cases of fraud as to any other. *Ford v. Chambers*, 19 Cal. 148.

84. In an action where one of the issues raised is a question of fraudulent intent in the sale or disposition of property, the fraudulent intent is a question of fact alone, to be left solely to the determination of the jury, and in such cases it is error for the Court to instruct the jury as to the effect or force of the evidence upon the question of fraudulent intent. *Id.*

85. The Constitution prohibits Judges from charging juries with respect to matters of fact, except to state the testimony and declare the law resulting from the evidence. *Id.*

86. Actions by and against administrators.—In suit by an administrator against defendant, for conversion of the property of the estate, under the one hundred and sixteenth section of the statute to regulate the settlement of estates, the proof, as to the right, or title, or possession, of plaintiff, and the taking or interference by defendant, being conflicting, it is error to instruct the jury that a mere demand on the defendant, and refusal by him to surrender the property, charge him with a conversion. *Beckman v. McKay*, 14 Cal. 250.

87. In an action against an administrator, the Court should, if asked, charge the jury as to the statute time within which the action could be brought when the claim is rejected. *Benedict v. Hoogin*, 2 Cal. 385.

87. It is error in the Court to refuse to instruct the jury in accordance with the provisions of the one hundred and thirty-fifth section of the Act to Regulate the Settlements of the Estates of Deceased Persons, when requested as to do, and the evidence shows that it is proper and relevant. *Id.*

88. Various causes of action.—The action was against surgeons "for malpractice, by which amputation became necessary." The Court charged, erroneously, "that if they believe from the evidence that the defendants were guilty of negligence, carelessness, or inattention, in their treatment of plaintiff's wound, by which he was caused great bodily pain and suffering, the plaintiff is entitled to a verdict." The action was not brought for bodily pain or suffering. *Moor v. Teed*, 3 Cal. 190.

90. Where the vendee of goods is to pay a part of the purchase money to the creditors of his vendor, this creates no trust in the goods sold in favor of such creditors: therefore, in an action to recover such goods, the following instruction to the jury is improper: "If the jury believe, from the testimony, that the agreement between Stevens & Markling, the vendors of the plaintiff, was that the plaintiff was to pay certain of the debts of his vendors out of said goods, then that such sale, as against the other creditors of the vendors, is fraudulent." *Wellington v. Sedgwick*, 12 Cal. 469.

91. Where defendants were sued as factors, although no claims for commissions, etc., were set out as a counter-claim, it was error for the Court to charge the jury that it was for them exclusively to say what amount the plaintiff was entitled to recover, and that the defendants were liable for the value of the goods at the time of demand. *Labert v. Chauviteau*, 3 Cal. 463.

92. In an action on guaranty, though it is error in terms to charge the jury if they find for the plaintiff, to assess as damages the amount of the penalty fixed in the guaranty, yet if the plaintiff's damages, if any, must exceed the penalty, the direction must be regarded as limiting the verdict, and the defendant is not injured by the instruction. *Jones v. Post*, 6 Cal. 102.

93. Where in a suit on an account stated, the only evidence was that of a witness, who said defendant, on presentation of the account, admitted it to be correct, and promised to pay it, and the Court charged the jury that, if they believed the testimony of the witness, they must find for the plaintiff the amount claimed, and they so found: *Held*, that the instruction did not prejudice defendant, as but one verdict could have been rendered under the evidence. *Terry v. Stokles*, 13 Cal. 427.

94. Plaintiff sues on a contract of sale of cattle, to be delivered within "three weeks, at the furthest"—the consideration money being paid—adding also the common counts. Complaint avers the breach of the agreement by failure to deliver the cattle. *Held*, that it was not error in the Court below instructing the jury, that if defendant did not have the cattle ready for delivery at the time mentioned in the contract, they should find for plaintiff; and in assessing damages, they might find the purchase money, with ten per cent. interest, or the

highest market price of the cattle to the time of trial. *Maher v. Riley*, 17 Cal. 415.

95. It is not error to instruct a jury that. If sufficient time had elapsed between the dealings of the plaintiffs with the old firm, and their subsequent transactions with the new firm, to put a reasonable man on inquiry, they might be treated as new dealers. *Treadwell v. Wells*, 4 Cal. 260.

§ 166. *The jury may decide in Court, or retire for deliberation. Duty of officer in charge.*

After hearing the charge, the jury may either decide in Court, or retire for deliberation. If they retire, they shall be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the Court. The officer shall, to the utmost of his ability, keep the jury together, separate from other persons; he shall not suffer any communication to be made to them, or make any himself, unless by order of the Court, except to ask them if they have agreed upon their verdict; and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

§ 167. *Jury may take with them certain papers.*

Upon retiring for deliberation the jury may take with them all papers (except depositions), which have been received as evidence in the cause, or copies of such papers as ought not, in the opinion of the Court, to be taken from the person having them in possession: and they may also take with them notes of the testimony, or other proceedings on the trial, taken by themselves, or any of them; but none taken by any other person.

§ 168. *May come into Court for further instructions.*

After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into Court. Upon their being brought into Court, the information required shall be given in the presence of, or after notice to, the parties or counsel.

1. After the jury have once retired, it is error to allow them to come into Court and receive instruction in the absence of the parties or their counsel. *Redman v. Fouts*, 5 Cal. 148.

2. Such instructions will be considered important, if the contrary is not shown, from the very fact that the jury have asked for them. *Id.*

§ 169. *When prevented from giving verdict, the cause may be again tried.*

In all cases where a jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the Court shall direct.

§ 170. *While jury are absent, Court may adjourn from time to time. Sealed verdict. Final adjournment discharges the jury.*

While the jury are absent, the Court may adjourn from time to time, in respect to other business ; but it shall nevertheless be deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered, or the jury discharged. The Court may direct the jury to bring in a sealed verdict, at the opening of the Court, in case of an agreement during a recess, or adjournment for the day. A final adjournment of the Court for the term shall discharge the jury.

1. Where a jury are instructed to bring in a sealed verdict, and they retire, and after agreeing upon the verdict, seal it up, and give it to the officer in charge of them—the clerk being absent—and request him to give it to the clerk, which is done ; and after the meeting of the Court the following morning, the verdict is opened in the presence of the jury, and read by the clerk, without exception : *Held*, that this is not an error sufficient to warrant a new trial. The possession by such officer left the verdict as much in the possession of the Court itself as if it had been directly delivered to the clerk. *Paige v. O'Neal*, 12 Cal. 483.

2. Nor will it make any difference when the names of the jurors were not called and they were not asked whether they had agreed upon their verdict, where the parties were present, and took no exception at the time ; and where it is not pretended that the verdict entered differs from the one sealed up, or that the result is in any respect affected by the omission. *Id.*

3. The opportunities of tampering with jurors after separation, are so numerous, and in important cases the temptation is so great, and the ability of detection so slight, as to make it a matter of grave doubt whether sound policy does not require an adherence to the verdict as sealed, even as against a subsequent dissent of one or more of the jurors. *Id.*

§ 171. *The jury having agreed upon a verdict, shall declare the same.*

When the jury have agreed upon their verdict, they shall be conducted into Court by the officer having them in charge. Their names shall then be called, and they shall be asked by the Court, or the clerk, whether they have agreed upon their verdict ; and if the foreman answer in the affirmative, they shall, on being required, declare the same.

1. There is no right to poll a jury in a civil case after the verdict has been recorded; nor before, unless there are circumstances of suspicion attending the delivery of the verdict. *Bum v. Pate*, 20 Cal. 69.

2. But in all cases it rests with the discretion of the Court. *Id.*

3. The jury, acting as a body, speak through their foreman, and his assent is conclusive upon all, unless a disagreement to the record be expressed at the time. *Id.*

4. It shall not be necessary to call the plaintiff before receiving the verdict of the jury. District Court Rules, No. XIV, San Francisco County.

§ 172. *Informal or insufficient verdict may be corrected under advice of the Court.*

If the verdict be informal, or insufficient, in not covering the whole issue or issues submitted, the verdict may be corrected by the jury, under the advice of the Court, or the jury may be again sent out.

1. It is competent for the Court to instruct the jury to amend their verdict as to form, not affecting the substance, and in such manner as to be unexceptionable in law. *Truebody v. Jacobson*, 2 Cal. 284.

2. The Court may amend the verdict of a jury when it is defective in something merely formal, and which has no connection with the merits of the case, where the amendment in no respect changes the rights of the parties. *Perkins v. Wilson*, 3 Cal. 139.

3. The verdict may conform to the issues. If the Court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment, and go beyond the verdict, it is error. *Ross v. Austill*, 2 Cal. 192.

4. A general objection to the form of a verdict, without any specification of the particulars in which it is alleged to be defective, will not be considered. *Mahoney v. Van Winkle*, 21 Cal. 552.

§ 173. *Verdict shall be recorded in full in the minutes.*

When the verdict is given, and is not informal or insufficient, the clerk shall immediately record it, in full, in the minutes, and shall read it to the jury, and inquire of them whether it be their verdict. If any juror disagree, the jury shall be again sent out; but if no disagreement be expressed, the verdict shall be complete, and the jury shall be discharged from the case.

1. The Court shall direct the verdict of a jury to be recorded as rendered by it. That should be treated as the verdict which the jury actually brings. *Moody v. McDonald*, 4 Cal. 297.

2. Where an informal verdict is received and recorded by consent of the plaintiff, and judgment in form is afterwards entered thereon, on appeal the informality will be disregarded. *Treadwell v. Wells*, 4 Cal. 263.

3. Before a verdict is recorded it should be declared by the foreman of the jury, or, if sealed, read by the clerk, so that the parties may be distinctly informed of its purport. It is irregular to record the verdict before it is thus announced, but the irregularity must be objected to at the time, or it will not be noticed on appeal. *Bum v. Pate*, 20 Cal. 69.

4. Assent to a recorded verdict, expressed by the foreman, is conclusive upon all the jury, unless a disagreement is expressed at the time. *Id.*

5. *Polling Jury.*—In a civil action it is not a matter of right, which either

party may claim, to have a jury polled. Before the verdict is recorded, it is a matter resting in the discretion of the Court to allow the proceeding; it will generally be allowed where circumstance of suspicion attend the delivery of the verdict. After the verdict is recorded the proceeding is never allowed. With the assent of the jury to the verdict as recorded, their functions with respect to the case cease, and the trial is closed. *Id.*

6. See further, § 178, *post*.

TITLE XV.

THE VERDICT.

SMITHSON 174. General and special verdicts defined.

175. When general or special verdicts may be rendered.

176. Verdict in actions for the recovery of money, or on establishing counter claim.

177. Verdict in actions for the recovery of specific personal property.

178. Entry of verdict.

§ 174. *General and special verdicts defined.*

The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict shall present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact shall be so presented, as that nothing shall remain to the Court but to draw from them conclusions of law.

N. Y. Code, § 260.

1. **General Verdict.**—A general verdict will conclude all parties who do not answer separately or demand separate verdicts. *Winans v. Christy*, 4 Cal. 70; *Ellis v. Jeans*, 7 Id. 409.

2. The plaintiff in ejectment may sue one or more defendants, and they may answer separately, or demand separate verdicts; unless they do so, however, they will be concluded by a general verdict. *Winans v. Christy*, 4 Cal. 70.

3. In ejectment, the verdict may be joint against several defendants, without specifying their respective lots in a whole tract, where they file a joint answer which contains no averment as to the particular portion of land occupied by each, no proof being offered on the point, no damages being claimed, and the defendants being in possession. *McGarvey v. Little*, 15 Cal. 31.

4. A joint verdict against the defendants answering and a defaulting defendant, is conclusive against all the defendants, when a separate verdict has

not been demanded. *Anderson v. Parker*, 6 Cal. 187; *Ellis v. Jeans*, 7 Cal. 469.

5. In action to recover possession of land, the jury rendered the following verdict: "We, the jury in this cause, find a verdict in favor of the plaintiff against defendants, for the possession of the premises described in the complaint herein, and the sum of one hundred and sixty-five dollars damages." *Held*, to be substantially a general verdict, covering all the issues, and that it does not limit the finding to any particular fact or single issue. *Hutton v. Reed*, 25 Cal. 491. See *Leese v. Clark*, 28 Cal. 26, and authorities there cited. See *ante*, § 144, note Nos. 38, 39, 40.

6. The jury under a general submission found "a verdict in favor of plaintiff, with one dollar damages." *Held*, that the verdict decided the question of title in favor of plaintiffs, and that upon it they were entitled to a decree perpetually enjoining defendants from working upon the ground claimed in the complaint; that this equitable relief was a matter of right, the denial of which by the District Court was error. *McLaughlin v. Kelly*, 22 Cal. 211.

7. The Court, having instructed the jury that, if they found that plaintiffs were entitled to the mining ground, they must find a verdict for \$1,000 damages upon the admission of the answer: *Held*, that because the jury brought in a verdict for one instead of one thousand dollars damages, it was not therefore to be concluded, in direct opposition to their general verdict, that they did not find the title in the plaintiff. The damages being admitted by the pleadings, were not in issue, and the verdict in that respect was immaterial. *Id.*

8. Special verdict.—A special verdict settles the facts, and the Court by its judgment pronounces the conclusion of law upon the facts found. If the Court errs in this respect, the error may be reviewed without any motion for new trial; but the right to correct the verdict does not depend upon the judgment, and the steps necessary for that purpose must be taken within the statutory time. *Allen v. Hill*, 16 Cal. 117.

9. On the rendition of a special verdict, the trial is terminated, and notice of motion for new trial must be given within the statutory time, or the proceedings based upon such notice will be disregarded. *Id.*

10. The party in whose favor a judgment is rendered on a special verdict must move for a new trial, if he is not satisfied with the verdict, as the latter must otherwise be conclusive upon the facts in the appellate Court. *Garwood v. Simpson*, 8 Cal. 108; *Duff v. Fisher*, 15 Id. 380.

11. In ejectment for a tract of land, plaintiff claiming under a deed from one McDowell, the case turned upon the question whether plaintiff, at the time of his purchase from McDowell, had notice of a prior verbal sale of the land from McDowell to defendant. The jury, to whom this question had been submitted in special issues, returned a verdict, "If possession was notice, he had." *Held*, that this finding is insufficient because equivocal, neither finding directly the fact of possession, nor the time of it, nor the kind of possession. *Woodson v. McCune*, 17 Cal. 296.

12. Where the point on which the case hinged was whether Kappelman & Co., who employed plaintiff to do work, acted as contractors in individual capacity, or as agents of defendants, and the jury found a special verdict that "the work and labor done by plaintiff in the construction of the dam was done at the instance and request of Kappelman & Co., who were the agents of the corporation defendant:" *Held*, that this verdict does not support a judgment for plaintiff, because it does not show in and of itself a legal conclusion of liability, not finding whether K. & Co. acted as agents or otherwise. *Garfield v. K. & T. M. Water Co.*, 17 Cal. 519.

13. A special verdict must, under section one hundred and seventy-four of the Practice Act, find the facts expressly and specially, and not generally or impliedly. *Breeze v. Doyle*, 19 Cal. 101.

14. Where special issues are submitted to a jury, they should include all questions of fact raised by the pleadings and necessary to determine the case, and should be separately and distinctly stated, so that each question should relate to only one fact. *Phoenix Water Co. v. Fletcher*, 23 Cal. 482.

15. In an action to recover a quartz ledge, when the defendants deny plaintiffs' title and ouster, and set up title in themselves to a part only of the ledge, as special verdict awarding defendants that portion of the ledge they claim without a general verdict, if accepted by plaintiffs, is a finding in favor of defendants, and entitles them to costs. *Gonzales v. Leon*, 31 Cal. 98.

16. The acceptance by the plaintiff of a special verdict which gives defendant part of the property in dispute without a finding on the other issues, is a withdrawal from the consideration of the Court of all that property in relation to which there is no finding. *Id.*

17. A special verdict that defendants are entitled to all of a quartz ledge, between their notices, being three hundred and fifty feet, more or less, gives defendants all between the notices, if more than three hundred and fifty feet. *Id.* See post, § 175.

18. **Separate verdicts.**—Where several defendants in ejectment unite in an answer amounting to a general denial, a joint verdict is proper, though the answer concludes with a prayer for separate verdicts. To entitle defendants to separate verdicts, they should set forth with specific description the parcels which they severally occupy or claim, and thus direct the attention of plaintiff to the course of defense upon which they will separately insist. *Patterson v. Ely*, 19 Cal. 28. See further, § 144, No. 36.

19. **Verdict conclusive upon facts found.**—The finding of a jury, or of the Court below, acting as a jury, upon a question of fact, is final and conclusive. *Perry v. Cochran*, 1 Cal. 180; *Duff v. Fisher*, 15 Id. 380.

20. A general verdict does not operate as an estoppel, except as to such matters as were necessarily considered and determined by the jury. A verdict is never conclusive upon immaterial or collateral issues. *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 145.

21. Where a verdict is general, its effects will be limited to such issues as necessarily controlled the action of the jury. *Kidd v. Latrd*, 15 Cal. 161.

22. A verdict found on any fact or title distinctly put in issue, is conclusive in another action between the same parties, or their privies, in respect of the same fact or title. *Id.*

23. But the fact or title must be material and relevant; must be distinctly in issue; must be tried by the jury, and constitute the basis of their verdict; and, unless specially found, must have been necessarily passed upon by the jury. *Id.*

24. If the statement discloses no refusal on the part of the Judge of the Court below to charge the jury on any matter submitted, nor is any erroneous charge assigned as error, the verdict of the jury must be considered as having settled all the facts of the case. *George v. Law*, 1 Cal. 364.

25. The verdict of a jury in a chancery case is only advisory to the Chancellor of this Court. *Sill v. Saunders*, 8 Cal. 281.

In chancery cases, the Court below may disregard the verdict of a jury. *Goode v. Smith*, 13 Cal. 84.

26. **Effect of verdict on defects in pleading.**—The general rule as to the effect of a verdict upon defects in pleading is, that whatever facts are not expressly stated, which are so essential to a recovery that without proof of them on the trial a verdict could not have been rendered under the direction of the Court, then the want of the express statement is cured by the verdict, provided the complaint contains terms sufficiently general to comprehend the facts, in fair and reasonable intentment. *Garner v. Marshall*, 9 Cal. 268.

27. A defective allegation of a fact may be cured by default or verdict, but not so the entire absence of any allegation whatsoever. *Hentz v. Porter*, 18 Cal. 555.

28. Where a declaration states a condition precedent, and fails to aver performance, the defect must be urged on demurrer; it comes too late after verdict. *Happe v. Stout*, 2 Cal. 461.

29. An omission to allege delivery, in an action on a bond, can be taken advantage of only on demurrer, and not after verdict. *Garcia v. Sabastay*, 4 Cal. 244; *Wilkins v. Stridger*, 22 Cal. 235.

30. Defects in an indictment are not cured by verdict, but may be taken

advantage of by motion in arrest of judgment. *People v. Wallace*, 9 Cal. 32.

31. A verified complaint, which in stating a special demand essential to the cause of action, contains only the general averment that "defendants, though often requested, have refused," etc., is sufficient in this respect, unless demurred to for want of certainty. If not demurred to, the defective averment is cured by verdict and judgment, and the objections cannot be raised for the first time in the appellate Court. *Mills v. Barney*, 22 Cal. 240; *Jones v. Block*, 30 Cal. 227.

32. When a complaint contains the substantial averments of a cause of action, though defective in form and certainty, the defect is cured by a verdict or default. *People v. Rains*, 23 Cal. 128.

33. Jurors cannot impeach their own verdict.—It is a settled rule, founded upon considerations of necessary policy, that the testimony of a jurymen cannot be received to defeat his own verdict; and in a criminal case, the affidavit of a jurymen, made after verdict, that he had formed and expressed an opinion before the trial, cannot be received on a motion for a new trial. *People v. Baker*, 1 Cal. 403.

34. The affidavit of jurors will not be allowed to contradict their verdict. *Castro v. Gill*, 5 Cal. 40; *Amboy v. Dickhouse*, 4 Id. 102; *Wilson v. Berryman*, 5 Id. 44. See *Boyce v. Cal. Stage Co.*, 25 Id. 475, and authorities there cited.

[Reception, where the verdict is the result of "a resort to the determination of chance." See second sub., § 193, post.]

35. It seems that the testimony of the sheriff is competent to disclose what transpires in the jury-room. *Wilson v. Berryman*, 5 Cal. 44.

36. Affidavits of counsel and others on information respecting the misbehavior of the jury while considering their verdict, are not admissible to impeach the verdict. *People v. Hartung*, 8 Abb. 132; *People v. Wilson*, Id. 137.

37. The appellate Court must infer in favor of the verdict below, unless error is clearly manifest. *Allen v. Phelps*, 4 Cal. 259.

38. Informal and insufficient verdict may be corrected. See § 172, and notes.

39. Grounds upon which a verdict will be set aside. See § 193, and notes.

40. Court may impose conditions.—Courts may impose, as a condition of allowing a verdict to stand in other respects, the remission of damages in cases where there was no evidence on the subject of damages, or where the evidence was entirely incompetent, or where the Court differs from the jury as to the effect of the evidence. But where, as in this case, the verdict for the damages was based entirely upon an admission by the record, it must stand. The admission, if good for anything, is good for the entire amount specified. Id. *Patterson v. Ely*, 19 Cal. 28.

A chance verdict, what is.—See *Boyce v. Cal. Stage Co.*, 25 Cal. 475, and authorities there cited.

41. Generally.—A stipulation that a verdict should be entered in favor of the defendant, saving to the plaintiff the same rights which he would have had in case a jury had actually rendered a verdict for the defendant, should be regarded in precisely the same light as a verdict, and be followed by the same legal results. *Sunol v. Hepburn*, 1 Cal. 258.

42. The verdict must be confined to the matters put in issue by the pleadings. *Benedict v. Bray*, 2 Cal. 256; *Truebody v. Jacobson*, Id. 285.

43. The verdict may conform to the issues. If the Court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment, and go beyond the verdict, it is error. *Ross v. Austill*, 2 Cal. 192.

44. The verdict of a jury is a matter of record, and copies thereof may be sufficiently authenticated by the certificate of the clerk. *Reynolds v. Harris*, 2 Cal. 618.

45. A joint verdict against the defendants answering, and a defaulting defendant, is conclusive against all the defendants, when a separate verdict has not been demanded. *Anderson v. Parker*, 6 Cal. 197.

§ 175. ¹When a general or special verdict may be rendered.

In an action for the recovery of money only, or specific real property, the jury in their discretion may render a general or special verdict. In all other cases the Court may direct the jury to find a special verdict in writing, upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk and entered upon the minutes. Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the Court shall give judgment accordingly.

¹Amended 1854, 88; N. Y. Code, §§ 261, 262.

1. The Court may direct a special verdict to be entered in the action. *Burritt v. Gibson*, 3 Cal. 396.

2. **Conflicting, general and special verdict.**—When the jury are directed by the Court to find a general verdict, and also to make a special finding of facts upon questions submitted to them, and a general verdict is returned in favor of one party, while the finding upon the special issues is in favor of the other party, the Court should render judgment in accordance with the special findings, if they embrace all the issues raised in the pleadings. If, however, there is any one in issue in the pleadings, not covered by the special findings, the judgment should be rendered on the general verdict. *McDermott v. Higby*, 23 Cal. 489.

3. When a jury renders a general verdict, and also special findings, the latter will control the former, if there is any inconsistency between them; and the Court will direct judgment to be entered in accordance with the special findings. *Leese v. Clark*, 20 Cal. 387.

4. **Special issues withdrawn from a jury.**—Where special issues are submitted to a jury, and they announce that they cannot agree upon the special issues, but can agree upon a general verdict, and by consent of counsel on both sides, the special issues are withdrawn, and a general verdict received by the Court, no error is committed. *Mitchell v. Hockett et al.*, 25 Cal. 545.

5. **The court must settle the questions, etc.**—It is the province of a Court to determine as to what particular facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question to be submitted to the jury. *American Company v. Bradford*, 27 Cal. 364. See further, *ante*, § 174.

§ 176. *Verdict in actions for recovery of money, or on establishing a counter-claim.*

When a verdict is found for the plaintiff, in an action for the recovery of money, or for the defendant, when a counter-claim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury shall also find the amount of the recovery.

N. Y. Code, § 263. See § 47, "Counter claim."

1. The theory of the law is not that the party recover the particular note

or chose in action, as is commonly imagined, but that he recovers damages for the non-performance of the contract; and in case of failure to pay money due, the true damage is the amount of money owing, and the interest which was agreed upon. *Guy v. Franklin*, 5 Cal. 417.

2. Action on an appeal bond, in which defendants claim the right to offset the balance of a decree in a foreclosure suit, which they have purchased and now hold against James B. Duff and James T. Ryan, and eleven other defendants in that suit, upon the ground that James B. Duff and James T. Payne are the parties beneficially interested in the claim in suit in this action, and that they and the other eleven defendants in the decree sought to be offset are insolvent: *Held*, that the set-off cannot be allowed, as well because of the provisions of section forty-seven of the Practice Act, which require a counter-claim to be between parties to the record between whom a several judgment might be had in this action, as of the provisions of the sections one hundred and seventy-six and one hundred and ninety-nine, which would require a judgment for the excess to be given against the plaintiff, although as against him it is not claimed that defendants have any demand. *Duff v. Hobbs*, 19 Cal. 646.

§ 177. *Verdict in actions for the recovery of specific personal property.*

In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property, and may, at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

N. Y. Code, § 261.

1. In an action for replevin when the defendant has required the return of the property, and given an undertaking for such purpose, a judgment for plaintiff, in order to hold the sureties on the undertaking, must be in the alternative as required by sections one hundred and four, one hundred and seventy-seven, two hundred and two hundred and ten of the Practice Act. *Nickerson v. Chatterton*, 7 Cal. 568.

2. Section one hundred and seventy-seven of the Practice Act applies only when the issues of the case have been submitted and passed on by the jury, and not to a case of judgment of nonsuit. *Glavin v. Atwood*, 8 Cal. 446.

3. An officer attaching goods under civil process is entitled to notice of the claim of a third party to the goods, and a demand for them, or he is not liable in damages to such party for such seizure and detention. *Daniel v. Gorham*, 6 Cal. 44; *Killey v. Scannell*, 12 Id. 75.

4. In an action of replevin by W., it appeared on trial that the property sued for belonged to him and one F., a third party, and the jury returned a general verdict for the defendants, and the Court gave judgment for a return of the property to the defendants: *Held*, that there was no error in the judgment. *Waldman v. Broder*, 10 Cal. 379.

5. In an action to recover the possession of personal property, with damages for its detention, the judgment may be for more than the value as alleged in the complaint, if it be within the *ad damnum* of the writ. The value of the property is only the predicate of the recovery. *Coghill v. Boring*, 15 Cal. 218.

6. The rule is, that when property converted has a fixed value, the measure of damages is that value, with legal interest from the time of its conversion;

when the value is fluctuating, the plaintiff may recover the highest value at the time of its conversion, or at any time afterward. *Douglass v. Craft*, 9 Cal. 563; *Dorsey v. Manlove*, 14 Id. 553.

7. The one hundred and seventy-seventh section of the Practice Act, and the decision under it, to the effect that the sureties upon the undertaking given by the plaintiff in a replevin action to procure a delivery of the property, are not responsible for a return of the property or its value, unless a return was claimed in the answer and awarded by the judgment, do not apply to cases where the action is dismissed by the plaintiff before trial. *Mills v. Gleason*, 21 Cal. 274.

8. The dismissal of a replevin action by plaintiff before trial, leaves the parties to settle in an action upon the undertaking those matters including the right of defendant to a return of the property, which, had the original suit been prosecuted, must have been determined therein in the first instance. The opportunity to obtain a judgment for the return having been taken away by the failure to prosecute, defendant is entitled to recover in an action on the undertaking, compensation in damages. *Id.*

§ 178. *Entry of verdict.*

Upon receiving a verdict, an entry shall be made by the Clerk in the minutes of the Court, specifying the time of trial, the names of the jurors and witnesses, and the verdict; and where special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it.

N. Y. Code, § 264; see also, § 173, *ante* and notes.

1. If the jury fails to find the fact of a lien, the Court cannot render a judgment essentially different from the verdict, and the judgment so far will be reversed. *Walker v. Hauss-Bijo*, 1 Cal. 186.

2. If the Court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment, and go beyond the verdict, it is error. *Kilburn v. Ritchie*, 2 Cal. 145.

3. Where there is no question as to the proper judgment to be entered on a verdict, the judgment should be entered at once, without waiting for a motion for a new trial. *Hutchinson v. Bours*, 13 Cal. 50.

4. A Court may, in term time or vacation, order judgment on a verdict rendered and recorded, if the motion for new trial were taken under advisement. *Id.*

5. The judgment, in pursuance of the verdict, is the act of law upon record facts, and follows as a matter of course, unless the Court intervene. *Id.*

6. Counsel, in the trial of a cause, cannot object that the Court did not render judgment on the special verdict of the jury, where they have stipulated that such additional facts may be found by the Judge as would, in his judgment, be sufficient to present all the questions raised by the pleadings. *Marius v. Bicknell*, 10 Cal. 224.

TITLE XVI.

CHAPTER V.—*Trial by the Court.*

- SECTION 179.** When and how trial by jury may be waived.
 180. Decision on trial of issue of fact by the Court.
 181. A reference may be ordered, when.

§ 179. *When and how trial by jury may be waived.*

Trial by jury may be waived by the several parties to an issue of fact, in actions arising on contract; and, with the assent of the Court in other actions, in the manner following:

- 1st. By failing to appear at the trial;
 - 2d. By written consent, in person or by attorney, filed with the clerk.
 - 3d. By oral consent in open Court, entered in the minutes.
- The Court may prescribe by rule what shall be deemed a waiver in other cases.

1. **Generally.**—The right of trial by jury may be waived in the mode prescribed by law. *Russell v. Elliott*, 2 Cal. 245.

2. The right of trial by jury cannot be waived by implication, but may be in the mode prescribed by law. *Smith v. Pollock*, 2 Cal. 92; *Russell v. Elliott*, Id. 245; *Ezrine v. Smith*, 5 Id. 112.

3. The Legislature alone can determine in what cases the right of trial by jury may be waived. *Ezrine v. Smith*, 5 Cal. 112.

4. A party having filed an undertaking to obtain an injunction, is deemed to have waived the right to insist on a trial by jury, and consented that the damages should be ascertained as prescribed by the statute; and an order of reference is no violation of the right to a trial by jury. *Russell v. Elliott*, 2 Cal. 245.

5. Parties to a suit in chancery are not entitled to a trial by jury. *Walker v. Sedgwick*, 5 Cal. 192; questioned in *Duff v. Fisher*, 15 Id. 376.

6. It would seem that a party cannot try his cause before a Judge without objection, and after losing it, complain that the case was not tried by a jury. *Smith v. Brannan*, 13 Cal. 107.

7. **First subdivision.**—The failure of either party to appear on the trial of a civil case, operates as a consent on his part that the issue be tried by the Court without a jury. But such failure to appear does not authorize the trial to be had by a jury of less than twelve persons. *Gillespie v. Benson*, 18 Cal. 409.

8. A less number than twelve persons does not constitute a legal jury, without the consent of the adverse party; and such consent must be express, and entered at the time in the minutes of the Court, and cannot be inferred from the mere absence of the party. *Id.*

9. The mere act of filing an answer does not operate as an appearance at the trial, so as to prevent the waiver of a jury trial, under the one hundred and seventy-ninth section of the Practice Act. *Zaine v. Croue*, 4 Cal. 112.

f. 10. The failure of the defendant to appear on the trial of an action of replevin, when the cause is called, is a waiver of a jury, under the one hundred and seventy-ninth section of the Practice Act. *Waltham v. Carson*, 10 Cal. 178.

11. The failure of defendant in ejectment to appear when the cause is called for trial—an answer being in—authorized the Court to try it without a jury. *Doll v. Feller*, 16 Cal. 432.

12. A jury may be waived by the parties by a failure to file with the clerk, at least six days before the commencement of the term at which the action may be tried, a notice that a jury will be required. *Doll v. Anderson*, 27 Cal. 250.

13. The Court has a right to direct an issue of fact to be tried by a jury, notwithstanding the parties have waived the same by a failure to give notice at least six days before the commencement of the term that one will be required. *Id.*

[The foregoing case relates to a rule of Court, and not to any legislative enactment.]

§ 180. *'Decision on trial of issue of fact by the Court. Exceptions to be filed, when.*

Upon a trial of issue of fact by the Court, judgment shall be entered in accordance with the finding of the Court, and the finding, if required by either party, shall be reduced to writing and filed with the clerk. In the finding filed, the facts found and the conclusions of law shall be separately stated. In such cases, no judgment shall be reversed on appeal for want of a finding in writing at the instance of any party who, at the time of the submission of the cause, shall not have requested a finding in writing, and had such request entered in the minutes of the Court; nor in cases tried by the Court by a commissioner or a referee shall the judgment be reversed on appeal for defects in the finding, unless exceptions be made in the Court below for a defect in the finding; and in cases of exceptions for defective findings, the particular point or issue upon which the party requires a finding to be made, or the particular defect to be remedied, shall be specifically and particularly designated; and upon failure of the Court to remedy, or when tried by a commissioner or referee, to cause to be remedied, by such commissioner or referee, the alleged defect, the party moving shall be entitled to his exceptions, and the same shall be settled by the Judge as in other cases; *provided*, that such exceptions shall be filed in the Court and served on the attorney of the adverse party within five days after receiving from or giving to the adverse party written notice of the filing of the finding; *provided*, that when any cause is tried and submitted upon a written statement of facts, agreed to by the parties or their attorneys, such statement shall have the effect of a

special verdict or finding of facts, and judgment shall be pronounced thereon as upon a special verdict or finding of facts; and in such case, no finding of facts shall be made unless such statement shall fail to embrace all the facts proved and in issue, in which case any additional fact may be found upon evidence which is not repugnant to the agreed statement.

¹ Amended 1866, 844.

1. **Directory.**—This section is directory as to the time required for the written decision to be filed. *Vermule v. Shaw*, 4 Cal. 216.

2. **This section applicable to cases both at law and in equity.**—The Act of 1861, regulating appeals, changes the rule laid down in *Walker v. Sedgwick*, (5 Cal. 192) and makes the statute, as to findings of fact and conclusions of law, applicable to cases both in law and in equity. *Lyons v. Lyons*, 18 Cal. 447.

3. *Walker v. Sedgwick* (5 Cal. 192) only decides that, under the Practice Act, the rule requiring the Court to find its conclusions of law and fact does not apply to equity cases, and does not conflict with our decision here. But we doubt that case, and leave the question of overruling it open. *Duff v. Fisher*, 15 Cal. 375.

4. **The court may file written findings, whether requested or not.**—*Gay v. Moss*, Oct. T. 1867.

5. **When finding not necessary.**—There is no necessity of a finding as to a fact admitted by the pleadings. A finding is only required when the allegation of a material fact in the complaint is controverted by the answer so as to raise an issue. *Swift v. Murygridge*, 8 Cal. 445.

6. **Facts averred in the complaint and not denied in the answer, are not required to be found by the Court.** *Fox v. Fox*, 25 Cal. 587.

7. **When a judgment is rendered on the pleadings, the Court need not make any finding of facts.** *Taylor v. Palmer*, 31 Cal. 242.

8. **Findings should be confined to facts in issue, and where a fact is admitted by the pleadings, a finding is wholly nugatory.** If the finding is against the fact as admitted, it will not be presumed that evidence was introduced to contradict the admission of record. *Burnet v. Stearns*, Oct. T. 1867.

9. **Manner of finding facts.**—The findings of a Court sitting as a jury may refer to the pleadings for the facts found, provided the reference is sufficiently distinct, and the facts are sufficiently stated in the pleadings. *MoEen v. Johnson*, 7 Cal. 258.

10. **The findings of the Court may refer to the pleadings.** As for instance, it would be sufficient to find that the promissory note, mortgage, or other instrument, set forth in the complaint, was executed by the parties, and at the time as therein alleged; and so with other matters alleged, which are established by the evidence. But in all such cases, the reference should be distinct and pointed, so as to leave no doubt as to what particular facts are intended. *Breese v. Doyle*, 19 Cal. 101.

11. **A special finding on the question of fraud should be always taken so as to keep it distinct from the main subject of controversy.** *Davis v. Robinson*, 10 Cal. 103.

12. **Where a jury is waived, and the cause tried by the Court, the Court should find the facts, and not merely state the proofs.** *Heredink v. Holton*, 16 Cal. 103.

13. **The findings of fact should not be interblended with matter of argument or the conclusions of law; each should be embodied in a separate paper.** *Bryon v. Manone*, 28 Cal. 238.

14. **A finding should consist of a concise, distinct, pointed, and separate statement of each essential fact established by the evidence, in the proper form, without any of the testimony by which the facts are proved, followed**

by a similar statement of the conclusions of law drawn from the facts thus found. An opinion is not a finding. The latter forms a part of the judgment roll; the former does not. *Hidden v. Jordan*, 28 Cal. 301.

15. The findings of the Court should be concise and pointed, statement of the several facts found, followed by the conclusions of law, without any mixture of argument, or the evidence from which the facts are found. *Jones v. Block*, 30 Cal. 227.

16. A finding that hay, alleged to have been converted by defendant to his own use, was worth twenty dollars per ton, without also finding the number of tons converted, does not entitle the plaintiff to a judgment. *Troy v. Clarke*, 30 Cal. 419.

17. Neither the opinion of the Court nor the evidence form any part of the findings of facts, although incorporated therein by the Court. In looking at the findings, the Court will only consider the ultimate facts found. *James v. Williams*, 31 Cal. 211.

18. The reasons given by a Judge in his findings are no part of the judgment. The point decided is the thing fixed by the judgment. *Burke v. Table Mountain Water Co.*, 12 Cal. 403.

19. The best practice concerning finding.

20. It is the better practice for the Court to find upon the facts upon which each party relies on the ground of title. *Morrill v. Chapman*, O. T. 1867.

21. The Court should first ask counsel on both sides if they desire findings; and if they do, reserve its judgment and direct each side to prepare and submit such questions of fact as they desire to have found. This being done, the Court should answer from the evidence every question submitted, and then, having first determined and settled all the facts, pronounce its judgment, and not before. If exceptions have been taken to the rulings of the Court, upon demurrers to evidence, they can be embodied in bills of exception, and brought up for review in that form. If, however, the practice of first announcing the judgment and preparing the findings afterwards is followed, the Court ought to direct the losing party to draw the findings. *Teakbury v. Mayroff*, O. T. 1867.

22. A party requiring a finding as to any fact in issue, should specify the point upon which he desires a finding, without dictating how the fact should be found. *Miller v. Steen*, 30 Cal. 402.

23. Sufficiency, test of.—The true test of the sufficiency of the findings of a Court is this: Would they answer if presented by a jury in the form of a special verdict. *Id.*

24. Sufficient findings.—Where, on suit against defendants as members of a quartz company, one defendant pleads that he was not a member of the company, and the finding of the Court is that the allegations of the complaint are true, and that said defendant was a member of the company as to plaintiff Park, the finding supports a judgment for plaintiff. *Parks v. Hinds*, 14. Cal. 415.

25. In suit on a note and mortgage—the answer not denying the execution thereof—the decree recited, among other things, that the Court had duly considered the premises, and that “it appears from the note and mortgage sued upon, that there was due plaintiff at the date of the commencement of this suit, for principal and interest upon the debt and mortgage mentioned and set forth in the complaint, the sum of \$2,000;” it is ordered, etc.: *Held*, that this constitutes a sufficient finding of facts to support the decree—amounting as it does, to an indirect finding of the substantial matters in the complaint, to wit: the execution and delivery of the note and mortgage. *Holmes v. West*, 17 Cal. 623.

26. In an action of ejectment against two persons, where one of the defendants had previously surrendered the possession of the premises to his co-defendant, this fact is sufficient to support the finding of the Court, that the possession was in one and not in the other. *Burke v. Table Mountain Water Co.*, 12 Cal. 403.

27. Findings, when cannot be defective.

28. If the findings of the Court cover all the issues made by the pleadings, they cannot be defective. Matters of evidence should not be included in the findings. *Rice v. Inskip*, Oct. T. 1867.

29. Findings immaterial to the decision.

30. Alleged errors in findings of fact will not be considered, where the findings themselves are immaterial to the decision. *Clockenbaum v. Pierson*, 22 Cal. 169.

31. Presumptions in favor of findings.—Where the record shows that all the evidence introduced on the trial is not embodied in the statement, the presumption is that the findings and judgment of the Court below are warranted by the evidence, although the statement contains no evidence upon which to base such findings and judgment. *Owen v. Morton et als.*, 24 Cal. 377.

32. If the findings of a fact are defective, and no exception is taken, the presumption is that the Court passed on the point not found, and decided it properly upon evidence applicable thereto. *Henry v. Everts*, 80 Cal. 425.

33. If the findings of fact are defective, the presumption is that proof was made at the trial in relation to the defective matter, and the judgment will not be reversed, unless the findings are excepted to. *Jenkins v. Frink*, 30 Cal. 586.

34. If the Court does not draw up a written finding of all the facts put in issue, and no exception is taken for want of a finding, the presumption is that those facts necessary to sustain the judgment, and not contained in the findings, were found by the Court. *James v. Williams*, 31 Cal. 211.

35. Where the Court finds simply that the defendant was in possession at the date of the action, and that he wrongfully withheld the possession of the same from the plaintiff, in the absence of any finding or admission to the effect that the property was held adversely, it must be presumed at least in favor of the judgment that this holding was in subordination to the legal title. *Sharp v. Dugney*, Oct. T. 1867.

36. Where there is no fact stated in the finding respecting the defendant's claim of title, it will be presumed that the Court found the title to the premises to be the plaintiff's, and that he was entitled to the possession. It is the better practice for the Court to find upon the facts upon which each party relies as the ground of title. *Morrill v. Chapman*, Oct. T. 1867.

37. Where the findings are silent as to the material points necessary to support the judgment and no effort is made to correct them, the Supreme Court will presume, in aid of the judgment, that the necessary facts were proved, unless the contrary appear. *Athearn v. Poppe*, April T. 1868.

38. Presumption, where there is no finding.

39. When there are no findings of fact in an action tried by the Court, all the issues of fact raised by the answer are deemed to have been found in favor of the party who recovered judgment. *Buckout v. Swift*, 27 Cal. 434.

40. A specific must control a general finding.—If a discrepancy exists between a general finding and the more specific findings of particular facts, the specific findings must control. *Hidden v. Jordon*, 28 Cal. 301.

41. Construction of findings.—The findings of a Court cannot be altogether detached from each other and considered separately. If a particular finding be doubtful or obscure, reference may be had to the others to ascertain the true meaning. *Millard v. Hathaway*, 27 Cal. 141.

42. In an action to recover judgment against a municipal corporation for work done by plaintiff on contracts, and warrants issued therefor, and also for other warrants purchased by plaintiff issued to other parties, if the Court finds as a fact that the warrants issued to plaintiff were issued after the accounts under the contract were audited, and were issued in consideration thereof, this amounts to a finding that the warrants were drawn for the amount due on the contracts. *Argenti v. City of San Francisco*, 30 Cal. 458.

43. Where there are several findings of fact, and a question arises as to the construction, they must be read together for the purpose of ascertaining the precise shade of meaning intended. *Kimball v. Lohmas*, 31 Cal. 154.

44. A stipulation controls a finding.—Where parties stipulate as to a fact, and the finding differs from the stipulation, the latter must give way to the former. *Carpentier v. Small*, Oct. T. 1866.

45. The parties stipulated that the evidence should be taken by a referee, and the cause tried before the Court on the evidence. The Court, instead of finding the facts from the evidence, found the allegations of the third count correct, because not denied. *Held*, that this was error, and that the Court should have regarded the allegations of the third count as denied, and found the facts from the evidence. *Kalkman v. Boyls*, 23 Cal. 303.

46. What questions will be considered in the supreme court.—Where there is a discrepancy between the finding of facts and the judgment, this Court may, on appeal, order the proper modification of the judgment; but where the judgment is in harmony with the pleadings and the finding of facts, and is erroneous by reason of a variance between the finding and the proof, the Supreme Court will not modify the judgment to suit the proof. *Clark v. Huber*, 20 Cal. 196.

47. If the findings of fact of the Court below are defective, and no objection is taken to them on that ground in the Court below, the objection cannot be raised in the Supreme Court. *Hurlburt v. Jones*, 25 Cal. 227.

48. If illegal testimony is admitted by the Court below, and the appellate Court cannot determine whether the finding of the Court below was based on this or other testimony in this case, the judgment will be reversed. *Roff v. Duane*, 27 Cal. 568.

49. An objection that the finding is qualified by the words, "as to plaintiff Park," and that the facts showing this relation to him ought to have been found, should have been taken below, and cannot be raised for the first time on appeal. *Park v. Hinds*, 14 Cal. 415.

50. If the findings of fact follow the issues raised by the pleading, and a demurrer would not be sustained to the complaint, the judgment will not be arrested upon the findings. *Millard v. Hathaway*, 27 Cal. 140.

51. If in an action to recover lands, the Court finds damages but gives judgment for possession without damages, and plaintiff appeals from that part of the judgment refusing damages, and the defendant appeals from the order, denying a new trial, the appellate Court may vacate the findings as to the damages if not justified by the evidence. *Carpentier v. Gardiner*, 29 Cal. 160.

52. Defects in the finding of facts cannot be relied on as a ground for a reversal of the judgment, unless the findings were excepted to on that ground. *Troy v. Clarke*, 30 Cal. 419.

53. The only question that can be raised in the appellate Court upon the findings, if no exception is taken to them, is, are they consistent with the judgment? *James v. Williams*, 31 Cal. 211.

54. The finding of a Court, like a special verdict of a jury, must, taken in connection with the pleadings, support the judgment. *Swift v. Muggridge*, 8 Cal. 445.

55. If a finding of facts is inconsistent with the judgment, it is fatal to the judgment without an exception being taken in the Court below. *Lucas v. San Francisco*, 28 Cal. 591.

56. A finding of facts by a referee that an alleged judgment more than five years old was properly entered, and is a good and valid judgment, does not support a judgment reported by him, that the plaintiffs have execution on the judgment. *Solomon v. Maguire*, 29 Cal. 227.

57. Where the declaration was upon a note, and there was but one count, and the Court found that the note was never given, but that the indebtedness of defendant to plaintiff was for merchandise sold: *Held*, that the finding was against the averment, and could not support this judgment. *Lewis v. Myers*, 3 Cal. 475.

58. Finding of fact to be reviewed, party must move for a new trial.—The findings of fact in the Court below will not be reviewed on appeal, unless there was a motion for a new trial; and this, whether the case be in equity or at law, tried by a jury or by the Court. *Gagliardo v. Hoberlin*, 18 Cal. 394.

59. The Supreme Court will not review the findings of the Court below in an equity cause upon a question of fact, if the party objecting to the finding and appealing does not move for a new trial, and appeal from the order overruling the motion. *Deputy v. Stapleford*, 19 Cal. 302; *Regla v. Martin*, Id. 474.

60. When the finding is against the evidence, counsel should move for a new trial, if he wants the evidence reviewed. *Rice v. Inskeep*, Oct. T. 1867. 34 Cal. 224

61. When a party thinks any finding is contrary to or unsupported by the evidence, he must make that a ground of motion for a new trial. He cannot avail himself of the alleged error in any other manner. Exceptions to conclusions of law are of no value. *Cowing v. Rogers*, Jan. T. 1868. 34 Cal. 648

62. Judgment will not be reversed for want of a finding or for a defective finding.—Previous to the Act of 1861, findings were required to support the judgment, but under that Act and Section 180, as amended in 1866, where there is no exception on the ground that the finding is defective or wanting, it is only requisite that the finding shall not be repugnant to or inconsistent with the judgment. *Sears v. Dixon*, Oct. T. 1867.

63. A judgment rendered in an action tried by the Court, without a jury, after the first day of July, 1861, will not be reversed for want of a finding of the facts, unless exceptions be made in the Court below to the want of a finding. *Cook v. De La Guerra et al.*, 24 Cal. 241.

64. A judgment rendered in an action tried by the Court, without a jury, will not be reversed for a defective finding of facts, unless exceptions are taken in the Court below to the defective finding, particularly specifying the defect, and the bill of exceptions is settled by the Judge, as in other cases. *Warner v. Holmes*, 24 Cal. 228.

65. If the answer sets up a counter claim, and the Court find that the defendant introduced no evidence as to the counter claim, the finding is defective; but, if the evidence is all before the appellate Court, and it appears that no testimony was introduced by either party as to the counter claim, the judgment will not be reversed on account of the defective finding. *Schroeder v. Johns*, 27 Cal. 281.

66. If the findings of the Court are deficient, the appellant must except to them for that reason, or the presumption will be that the facts not found warranted the judgment. *Bryon v. Masme*, 28 Cal. 238.

67. Where the findings in a case tried by the Court do not contain all the facts necessary to be proven in order to entitle the prevailing party to a judgment, it will not be reversed on appeal unless the Court below has, after the defect has been pointed out, failed or refused to make the required finding, and an exception has been taken thereto. *Lyons v. Lotnback*, 29 Cal. 139.

68. If the Court makes a finding of facts upon some of the issues, and the appellant neither excepts to it as defective, nor moves for a new trial, he cannot attack the finding either on the ground that it does not find all the facts in issue, or is unsupported by the evidence. *Green v. Clark*, 31 Cal. 591.

69. Findings, based on admissions.—The finding of a jury based upon an admission of the parties by the pleadings or otherwise, is not less an assessment of damages than if the finding were made upon conflicting evidence. *Id.*

70. Affidavits cannot be used in aid of a finding.—The findings are the only method by which the decision of the Court, on a question of fact, can be made manifest. It is not competent to establish by affidavit, the action of the Court in respect to its decision on a question of fact. *Sanchez v. McMahon*, April T. 1868.

71. Amendment of findings.—See § 68, note No. 131.

72. Generally.—A jury was waived by the parties, and the case submitted to the Court; the trial made some progress, when, on motion of plaintiff's attorney, the case was referred, "to ascertain the damages sustained by plaintiff." *Held*, the case having been submitted to the Court, it was the duty of the Court to find upon the facts adduced by the parties, and not the facts presented in a referee's report. *Geeska v. Brannan*, 2 Cal. 517.

73. The finding of a Court, like the verdict of a jury, is a matter of record, and copies thereof may be sufficiently authenticated by the certificate of the Clerk. *Reynolds v. Harris*, 8 Cal. 617.

74. In ejectment against several defendants occupying different portions of the land sued for, some of whom answer and others make default, and none appearing on the trial, the Court may make a general finding and enter a joint judgment against all the defendants for possession of the land and costs. *Lick v. Stockdale*, 18 Cal. 219.

75. As the findings in this case—ejectment with an equitable defense imperfectly set up, tried by the Court—do not strictly find such facts as show defendant's equity as against plaintiff's claim, the judgment for plaintiff is affirmed. *Meador v. Parsons*, 19 Cal. 284.

76. If, in an action to recover lands, the Court finds damages, but gives judgment for possession without damages, and the plaintiff appeals from that part of the judgment refusing damages, and the defendant appeals from the order denying a new trial, the appellate Court may vacate the findings as to the damages if not justified by the evidence. *Carpentier v. Gardiner*, 29 Cal. 160.

§ 181. *Reference may be ordered, when.*

On a judgment upon an issue of law, if the taking of an account be necessary to enable the Court to complete the judgment, a reference may be ordered.

TITLE XVII.

CHAPTER VI.—*Of references, and trial by referees.*

SECTION 182. Reference ordered upon agreement of parties, in what cases.

183. Reference ordered on motion, in what cases.

184. Number of referees, qualifications, etc.

185. Either party may object, grounds of objection.

186. Objections, how disposed of.

187. Referees to report within ten days, effect of, how accepted to, etc.

§ 182. *Reference ordered upon agreement of parties, in what cases.*

A reference may be ordered upon the agreement of the parties filed with the clerk, or entered in the minutes:

First—To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon:

Second—To ascertain a fact necessary to enable the Court to proceed and determine a case.

¹ Amended 1866, 845.

1. **Order of court is necessary.**—An order of Court is necessary to constitute a reference under the Code, and no reference would be good, as such, without an order. *Heslep v. City of San Francisco*, 4 Cal. 2.

2. An order of reference cannot go beyond the pleadings of the parties. *Branger v. Chevalier*, 9 Cal. 353.

3. A reference or arbitration, in which there is no order of Court or agreement filed with the clerk or entered on the minutes, is a voluntary withdrawal of the case from the jurisdiction of the Court, by which it loses all control over the case, and has no authority to enter judgment upon the finding, except by consent of parties. *Heslep v. City of San Francisco* 4 Cal. 2.

4. **Reference by consent.**—The consent of a party to an order of reference must be in writing, or entered on the minutes. *Smith v. Pollock*, 3 Cal. 92.

5. An order of reference cannot be made without the consent of the adverse party. *Benham v. Rose*, 2 Cal. 261..

6. Where an entry on the minutes recites that "the parties came by their attorneys, and defendant, by his attorney, moved the Court that the cause be referred;" *Held*, that such a reference was made on the appellant's motion, and in one of the modes prescribed by law, "by oral consent, in open Court, entered on the minutes." *Bates v. Fisher*, 2 Cal. 355.

7. A stipulation to refer the whole matter, is a waiver of any objection that the motion for a new trial and to set aside the award was not made within the statute time. *Heslep v. City of San Francisco*, 4 Cal. 2.

8. The whole issue in divorce cases cannot, even by stipulation of parties, be referred; and where a reference is had, the referee cannot pass upon the testimony. If he make any statement or finding of facts, the Court is obliged to disregard it, and base its decree only upon the legal testimony taken. *Baker v. Baker*, 10 Cal. 527.

9. The Court has no power, without the consent of the parties, to order a reference for the trial of any other issue of fact than that involved in the examination of an account in an equity case. *Williams v. Benton*, 24 Cal. 425.

10. The Court has no power, when either of the parties object, to order a reference with directions to the referee to report a judgment. *Id.*

11. **Equity suits may be referred without consent.**—The Court may order a reference in equity cases without consent of parties. *Smith v. Rose*, 4 Cal. 7. See *Still v. Saunders*, 8 Cal. 226, and *Burnham v. Rose*, 2 Cal. 261.

12. **Statute is in aid of the common law.**—Our statute concerning referees is in aid of the common law remedy by arbitration, and does not alter its principles. *Tyson v. Wells*, 2 Cal. 122.

See further, §§ 183, 187, and note.

§ 183. *Reference ordered on motion, in what cases.*

When the parties do not consent, the Court may, upon the application of either, or of its own motion, direct a reference in the following cases :

1st. When the trial of an issue of fact requires the examination of a long account on either side ; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein:

2d. When the taking of an account is necessary for the information of the Court before judgment, or for carrying a judgment or order into effect:

3d. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action; or,

4th. When it is necessary for the information of the Court in a special proceeding.

1. Our statute, as to referring cases, applies solely to equity causes. The right of trial by jury in all common law actions is secured by the Constitution of this State. *Grim v. Norris*, 19 Cal. 140.

2. A Court has not power to send an ordinary suit at law to a referee for trial against the objection of either party; and this, whether the suit requires the examination of a long account or not. And a statute authorizing a reference in such case would be unconstitutional. *Id.*

3. In an action of law, the necessity of taking a long account will not authorize the Court to refer the case without the consent of parties. *Id.*

4. And even if one of the parties subsequently waived his objection to the reference, that will not be sufficient. *Id.*

5. The Court may order a reference to ascertain the damages sustained by reason of an injunction issued without a cause. *Russell v. Elliott*, 2 Cal. 245.

6. Action, for balance of an account. Defense, payment by a promissory note. Replication, that the plaintiff was induced to receive the note by means of fraudulent representations. *Held*, that the case was not referable under the statute, without the written consent of both parties. *Seaman v. Mariani*, 1 Cal. 336.

7. In an equity case, where the trial of an issue of fact is involved, requiring the examination of a long account on either side, the Court may order a reference, with directions to the referee to report upon the account, or any issue of fact involved in the account. *Williams v. Benton*, 24 Cal. 425.

8. In an action to dissolve a partnership and obtain a settlement of the partnership accounts, the Court has power to order a reference for the trial of all the issues of fact relating to the condition of the partnership accounts; but it has no power, if objection is made, to order a reference of the trial of any other issue or issues in the case, nor to direct the referee to report a judgment. *Id.*

9. When the taking of an account is required, it is in the discretion of the Court to take an account, or to refer it to a commissioner or referee to state it. *Hidden v. Jordan*, 28 Cal. 301.

10. If the commissioner, to whom a case has been referred to take an account, commits an error at the threshold which unsettles the account, the Court is not bound to go over the account and correct the error, but may set aside the report and again refer the case. *Hidden v. Jordan*, 32 Cal. 397. [See same case, 28 Cal. 301.]

§ 184. ¹Number of referees, qualifications, etc.

A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the Court or Judge shall appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable and against whom there is no legal objection, or the reference may be made to a Court commissioner of the county where the cause is pending.

¹Amended 1866, 845. See § 529.

§ 185. *Either party may object; grounds of objection.*

Either party may object to the appointment of any person as referee, on one or more of the following grounds :

1st. A want of any of the qualifications prescribed by statute to render a person competent as a juror :

2d. Consanguinity or affinity, within the third degree, to either party :

3d. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party ; or being a member of the family of either party ; or a partner in business with either party ; or being security on any bond or obligation for either party :

4th. Having served as a juror, or been a witness on any trial between the same parties for the same cause of action :

5th. Interest on the part of such person in the event of the action, or in the main question involved in the action :

6th. Having formed or expressed an unqualified opinion or belief as to the merits of the action :

7th. The existence of a state of mind in such person evincing enmity against or bias to either party.

1. The fact that the referee, in the proceedings supplementary to execution, was the clerk of the attaching creditor, is not any considerable evidence of fraud, when the limited duties of the referee are considered. *Adams v. Hockett*, 7 Cal. 187.

§ 186. *Objections, how disposed of.*

The objections taken to the appointment of any person as referee shall be heard and disposed of by the Court. Affidavits may be read, and any person examined as a witness, as to such objections.

§ 187. *Referees to report within ten days, effect of, how excepted to, etc.*

The referees or Commissioner shall report their findings in writing to the Court within ten days (or within such further time as may be allowed by the Court) after the testimony shall have been closed, and the facts found and conclusions of law shall be separately stated therein. The finding of the referee or Commissioner upon the whole issue shall stand as the finding of the Court, and upon filing of the finding with the Clerk of the Court judgment may be entered thereon in the same manner as if the action had been tried by the Court.

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The finding of the referees or Commissioner may be excepted to and reviewed in like manner as if made by the Court. When the reference is to report the facts the finding reported shall have the effect of a special verdict.

¹Amended 1896, §45.

1. "Ten days" directory.—The provision of section 187 of the Practice Act as to the time within which a referee must file his report, is merely directory. A failure to file within the time will not invalidate the report or the judgment rendered thereon. *Keller v. Lutrick*, 22 Cal. 471.

2. Referees, powers and duties of trial.—Under a reference to try the issues and report a judgment, the referee can exercise all the powers of a Judge, in relation to the trial of the cause referred to him. *Plant v. Fleming*, 20 Cal. 92.

3. Referees have no power to allow the parties to alter the pleadings after a case has been submitted to them. *De la Riva v. Berreyesa*, 2 Cal. 195.

4. Referees should exclude items barred by the Statute of Limitations, if objected to. *Id.*

5. Where a reference is had to take an account, it is within the discretion of the referees to open the case, after it has been once closed, for the purpose of receiving additional testimony. The exercise of such discretion, except in case of gross abuse, will not be reviewed on appeal. *Marrison v. Piche*, 10 Cal. 545.

6. The trial of a referee should be conducted in the same manner as before a Court, and the evidence should be embodied in a bill of exceptions, and certified by the referee. *Goodrich v. City of Marysville*, 5 Cal. 490.

6. Hearsay and irrelevant testimony should be excluded by referees. *De la Riva v. Berreyesa*, 2 Cal. 195.

8. Where a referee admits the testimony of a witness against the objection of the defendant, such testimony cannot, after the case has been submitted, be thrown out, without first giving to the adverse party the opportunity of otherwise supplying the excluded testimony. *Monson v. Cooke*, 5 Cal. 436.

9. Reference and referee.—A reference with directions to the referee to take proofs concerning the confession of a judgment by the defendant, and the judgment roll in the case, and whether the same was filed in the clerk's office, and to report the testimony, with a finding of facts and a judgment, does not submit to the referee the question as to what amount, if any, is still unpaid in the judgment. *Solomon v. Maguire*, 29 Cal. 227.

10. Duty of referee.—It is the duty of a referee to act upon the questions committed to him, and to report whatever he is required to report by the order under which he acts. *Hahn v. Peck*, 30 Cal. 280.

11. Findings of a referee.—When the order of a reference requires the referee to try the issues, and report his finding thereon, the referee may make a general finding upon the facts put in issue, stating the facts according to their legal effect. *Id.* See post, No. 43.

12. Report, how, when and for what, set aside.—The report of a referee cannot be attacked, except for error or mistake of law, apparent on its face, or by motion for new trial upon exceptions taken at the trial, or the evidence certified. *Goodrich v. City of Marysville*, 5 Cal. 490.

13. If the order of reference fails to direct a return of the evidence to the Court, the party objecting to the report must see that such testimony as he relies on is properly certified. *Id.*

14. Error in the report of a referee must be taken advantage of by written objections to entering judgment on it, or by motion for a new trial. *Porter v. Barling*, 2 Cal. 72; *Id.* 122.

15. When the alleged error consists in the final conclusion of law or

facts drawn from the testimony, and the evidence is certified to the Court by the referee, the proper course is to move to set aside the report, and for a new trial. *Branger v. Chevalier*, 9 Cal. 362.

16. A reference is a substitution for a jury; and a judgment should be had upon their report as upon a verdict, and a motion to set aside the report of referees is necessary before the appellate Court be required to examine the report, and set the same aside. *Gunter v. Sanokas*, 1 Cal. 48.

17. Judgment is entered as a matter of course on the report of a referee, and the only mode to take advantage of error is to move to set the judgment aside, as on motion for a new trial. *Sloan v. Smith*, 3 Cal. 407.

18. A report of a referee can only be set aside on account of fraud, gross error of law or fact, apparent on its face. *Headley v. Reed*, 2 Cal. 324.

19. Court has power to set aside report of referee, and grant new trial, on the ground that the evidence before the referee did not justify his decision. *Cappe v. Brizzofard*, 19 Cal. 607.

20. A Court can interfere and set aside the report of a referee, upon the same ground as it will proceed to set aside the verdict of a jury. *McHenry v. Moore*, 5 Cal. 92.

21. The report of a referee upon conflicting evidence must be treated in the light of a verdict of a jury, and will not be disturbed in this Court upon an appeal from an order refusing to grant a new trial in the Court below. *Ritchie v. Bradshaw*, 5 Cal. 329.

22. Though a plea would be bad upon demurrer, yet if no objection be taken at the time, and the case be submitted to a referee, the defect of the plea is not sufficient reason to set aside the report. *Ritchie v. Davis*, 5 Cal. 453.

23. If there be no exception taken to the ruling of a referee, and the rule of law by which he arrived at his conclusions be not disclosed, the Court cannot disturb the report, and an order granting a new trial in such case will be reversed. *Tyson v. Wells*, 2 Cal. 130; *Grayson v. Guild*, 4 Id. 125. But, see *Battle Co. v. Morgan*, 19 Id. 609.

24. When a case is referred to a referee, under the statute, to hear and determine the issues of fact and of law, and report the same to the Court, and he makes his report, wherein no errors of law or fact occur, and no exceptions are taken, the Court below should not set aside the report and grant a new trial. *Grayson v. Guild*, 4 Cal. 125.

25. It would be a gross abuse of discretion for a Court to set aside a report of a referee, correct in all its parts, without any other apparent reason than the mere volition of the Judge. *Goodrich v. City of Marysville*, 5 Cal. 450.

26. It is error for the Court to set aside the report of a referee, upon an examination of testimony which was not properly before it. *Id.*

27. The Court will not disturb the award of an arbitrator or report of a referee, unless the error complained of, whether of law or fact, appear on the face of the award or report. *Tyson v. Wells*, 2 Cal. 123.

28. If there be no exceptions embodied in the report, showing that the referee erred in fact, and the rule of law by which he arrived at his conclusions be not disclosed, the Court cannot disturb the report; and an order granting a new trial in such cases will be reversed. *Id.* But, see *Battle Co. v. Morgan*, 19 Cal. 609.

29. After the rendition of judgment upon a report of referee, the Court may award a new trial, and set aside the report for any reason that would be sufficient to set aside the award of an arbitrator, and for no other. *Headley v. Reed*, 2 Cal. 322.

30. The provisions of the Practice Act relating to new trials are general, and vest in Courts the same power in cases tried by a referee as in cases tried by the Court itself, or by a jury. *Cappe v. Brizzolara*, 19 Cal. 607.

31. But when the alleged error consists in the final conclusion of law or fact drawn from the testimony, and the evidence is certified to the Court by the referee, the proper course is to move to set aside the report and for a new trial. *Branger and Driand v. Chevalier*, 9 Cal. 363.

32. Motion to set aside.—The time within which a notice of a motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, is regulated by section one hundred and ninety-five.

33. Failure to appear and prosecute a motion to set aside the report of a referee and for new trial, is an abandonment of motion, and the order made denying the motion for such failure to appear, is not the subject of review on appeal. *Mahoney v. Wilson*, 15 Cal. 43; *Frank v. Doane*, 15 Id. 303; *Green v. Doane*, 15 Id. 304.

34. Report should state facts found, etc.—The report of a referee, like the finding of a report, should state the facts found and the conclusions of law. Without this, the parties would be remediless, and their rights concluded, in many cases, by the arbitrary decision of a referee. *Lambert v. Smith*, 3 Cal. 409. See Rule No. XXI, for San Francisco County. See ante, No. 11.

35. Cannot file an amended report.—A referee has no right to bring in and file an amended report, and the case must be reviewed with reference to the original report. *Headley v. Reed*, 2 Cal. 324.

36. Referee need not be sworn.—The statute does not require the referee to be sworn; consequently, the imposition of an oath by the Court would be of no effect other than to put it in their power to commit moral perjury, without being amenable to the law. *Sloan v. Smith*, 3 Cal. 407.

37. Exception to report.—If the report of a referee is not made immediately after the close of the testimony, it is deemed excepted to. *Headley v. Reed*, 2 Cal. 324.

38. In a suit in chancery, it is perfectly competent for the Judge who tried the cause, after exceptions have been filed to the report of a referee upon the facts, and the report set aside for cause shown, to take up the testimony reported by the referee, find the facts and render a decree in the cause. *McHenry v. Moore et al.*, 5 Cal. 90.

39. Trials before a referee are conducted in the same manner as before Courts, and exceptions must be taken to the rulings of the referee, in the progress of the trial, in the same manner as they must be taken before a Court; and such exceptions must be embodied in the report of the referee, or made part thereof by his proper certificate. *Phelps v. Peabody*, 7 Cal. 50.

40. When the referee excludes proper or admits improper evidence, or does any act materially affecting the rights of either party, during the progress of the trial before him, then such party should except, and see that the exception is truly stated in the report. *Branger v. Chevalier*, 9 Cal. 353.

41. Report, effect of.—The facts found in the report of a referee are conclusive in the absence of the testimony, or where the testimony is not properly brought before the Court. *Goodrich v. City of Marysville*, 5 Cal. 430.

42. The report of a referee, under the statute, has the same legal effect as the award of an arbitrator. *Headley v. Reed*, 2 Cal. 322.

43. Finding of a referee conclusive as to the facts, on conflicting evidence. *Knowles v. Jost*, 13 Cal. 620; *Muller v. Boggs*, 25 Id. 179; *Peck v. Vandenberg*, 30 Id. 11.

44. The decision of referees upon a question of fact will be regarded on appeal, as conclusive as the verdict of a jury, and will not be interfered with. *Gunter v. Sanchez*, 1 Cal. 45; *Walton v. Minburn*, Id. 362.

45. The report of a referee is the same as an award of an arbitrator. *Grayson v. Guild*, 4 Cal. 125.

46. If a report of a referee, under the statute, contain sufficient on which to base a judgment, it is the duty of the Court below to enter judgment in accordance with the report, so far as it concerns the matter referred, and it has no right to entertain any objection whatever. *Headley v. Reed*, 2 Cal. 322.

47. Mandamus.—A mandamus lies to compel the Judge of a District Court to enter judgment on the report of a referee. *Russell v. Elliott*, 2 Cal. 246.

48. Referee's report of a judgment may be set aside, and a proper judgment entered.—If a referee reports the facts upon all the issues, but draws an erroneous conclusion of law from the facts found, and also reports a judgment in accordance with his conclusions of law, the Court, before a judgment is entered, may set aside the conclusions of law, and direct a proper judgment to be entered. *Calderswood v. Pyser*, 31 Cal. 333.

49. **Review on appeal.**—The Supreme Court will not review a judgment entered on the report of a referee, if no objection was made to the report in the Court below. *Porter v. Barling*, 2 Cal. 72.

50. When a report of a referee has been erroneously set aside, and a new trial granted, from which action the plaintiff appeals, the Supreme Court will correct both errors at the same time in a chancery case. *Grayson v. Guild*, 4 Cal. 125.

51. An order setting aside a report of a referee, appointed to take an account, is merely interlocutory, and not the subject of appeal before judgment. *Johnston v. Dopkins*, 6 Cal. 83.

52. An order setting aside the finding of a referee in a divorce case, and sending the case back to the referee for further testimony, is interlocutory in its character, and not the subject of appeal. *Baker v. Baker*, 10 Cal. 528.

53. It seems that a stay of proceedings, granted on an appeal from an order of reference, is proper. *Smith v. Pollock*, 2 Cal. 94.

54. Where the record on appeal contains a report of a referee by whom the case was tried below, in which is a finding of the facts by him, and no statement on motion for new trial appears in the transcript, it will be presumed that the findings of the referee were based upon sufficient evidence. *Donahue v. Cromartie*, 21 Cal. 80.

55. Where a cause is tried by a referee and the testimony is conflicting, the Supreme Court will not disturb his findings of fact. *Muller v. Boggs*, 25 Cal. 179.

56. The Supreme Court will not review the findings of a referee to ascertain whether they are contrary to the evidence, except on appeal from an order denying a new trial. *Peck v. Vandenberg*, 30 Cal. 11.

57. An order overruling an exception to the report of a referee, taken on the alleged ground that the report did not find the facts as required by the order of reference, may be reviewed on an appeal from a final judgment. *Id.*

58. **Court commissioners.**—A Court commissioner has no jurisdiction to hear a motion or make an order in reference to the dissolution of an injunction, unless the motion is referred to him by the Court. *Storm v. Busker Hill Co.*, 26 Cal. 497.

59. **Taking account by referee.**—If the commissioner, to whom a case has been referred to take an account, commits an error at the threshold which unsettles the account, the Court is not bound to go over the account and correct the error, but may set aside the report and again refer the case. *Hidden v. Jordan*, 32 Cal. 397.

TITLE XVIII.

CHAPTER VII.—General provisions relating to trials.

EXCEPTIONS.

SECTION 188. An exception, what is; what exception may be disregarded.

189. The point of exception shall be particularly stated, etc.

190. No particular form required.

191. When deemed excepted to.

§ 188. *An exception, what is; what exceptions may be disregarded.*

An exception is an objection taken at the trial to a decision

upon a matter of law, whether such trial be by jury, Court, or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision. But no exception shall be regarded on a motion for a new trial, or on an appeal, unless the exception be material, and affect the substantial rights of the parties.

1. An exception is an objection taken between the time of calling the action for trial and the rendition of the verdict or decision. *Quincy v. Gambert*, 33 Cal. 804.

2. A statement and bill of exceptions in the statute, on the subject of appeal, mean the same thing. *People v. Lee*, 14 Cal. 510.

3. The sole object of a bill of exceptions is to make a record of the special action of the Court of what is not record by the general law. But that which is of record already, cannot receive any higher degree of sanction by being made record a second time. *Parsons v. Davis*, 3 Cal. 425.

4. Exceptions must be taken during the trial.⁽¹⁾—Exceptions must be taken to the rulings of the referee during the trial and certified by him. *Tyson v. Wells*, 2 Cal. 122.

5. There is nothing in the statute which requires that exception to depositions shall be filed before the time of trial. The objection can be made at any time before they are read in evidence. *Dye v. Bailey*, 2 Cal. 384.

5. Objections to the form of a deed must be made on the trial at nisi prius. *Posten v. Rasette*, 5 Cal. 468.

6. Objections to the introduction of evidence must be taken on the trial below; they cannot be taken for the first time in the appellate Court. *Cordlaud v. Turner*, 7 Cal. 38.

7. A party cannot, by consenting to admit evidence, "subject to all legal exceptions," absolve himself from the necessity of taking exceptions to the relevancy or sufficiency thereof, and devolve the responsibility of discovering whatever objections may exist on the Court below, and after fishing for a verdict, for the first time assign his objections in the Supreme Court. *Id.*

8. A party cannot take his chances for a verdict on instructions given or refused without exceptions taken, and then after verdict except to the action of the Court upon motion for new trial. *Letter v. Putney*, 7 Cal. 423.

9. If exceptions to the rulings below be not taken at the time, they cannot be urged on appeal. *McCartney v. Fitz Henry*, 16 Cal. 186.

10. An exception should be made before the jury retires.—The one hundred and eighty-eighth section of the Practice Act does not fix the precise time when an exception to the charge of the Court to the jury must be taken. *St. John v. Kidd*, 26 Cal. 265.

11. If an exception to the charge of the Court to the jury is taken after the jury have withdrawn, to consider of their verdict, and before the verdict is rendered, the question of allowing or disallowing the exception rests in the discretion of the Court, and whether allowed or disallowed, the Supreme Court will not interfere with the exercise of this discretion. *Id.*

(1) STATUTES OF 1861, p. 589.—CHAPTER DXXII.

"SEC. 4. During the progress of a cause, a party may take his bill of exceptions to the admission, or exclusion, of testimony, or to the rulings of the Judge on points of law, and it shall not be necessary to embody in such bill anything more than sufficient facts to show the point and pertinency of the exception taken; the presiding Judge shall sign the same, as the truth of the case may be, which bill shall then become a part of the record; and a party against whom judgment is rendered may appeal from such judgment without any further statement, or motion; and on such appeal it shall only be necessary to bring to the Supreme Court the transcript of the pleadings, and the judgment, and the bill, or bills, of exception so taken."

12. **Exception to charge, how and when made.**—Exceptions to the charge of a Court should point out the specific portions of the charge excepted to, and should be made at the time of the trial, before the jury retires. *Hales v. Coleman et al.*, 25 Cal. 123.

13. **Exceptions to be attached to judgment roll.**—Bill of exceptions made during the progress of a trial should, under section one hundred eighty-eight, one hundred eighty-nine and two hundred and three of the Practice Act, be written down, settled and signed by Judge, filed in the case, and afterwards annexed to the judgment roll. *Mora v. Del Valle*, 28 Cal. 170.

14. **Errors, how reviewed.**—Error in law occurring at a trial, may be reviewed upon a bill of exceptions as well as upon a motion for a new trial. *Wells v. Preston*, 25 Cal. 61. An order striking out a statement on motion for a new trial, cannot be brought before the Supreme Court for review by a bill of exceptions. *Quivey v. Gambert*, 32 Cal. 304.

15. **Demurrer sustained or overruled.**—Where the transcript contained, together with the judgment roll, a copy of an order, certified to by the clerk, sustaining a demurrer to a replication, and there was no statement or bill of exceptions: *Held*, that the appellate Court could not review the action of the Court below upon the demurrer. *Rostwick v. McCorkle*, 22 Cal. 669.

16. **Respondent, exceptions by, when reviewed.**—It has been the practice of the Supreme Court to examine the case only upon the errors assigned by the appellant, and not to look into the exceptions taken by respondent. *Jackson v. Feather River Water Co.*, 14 Cal. 18.

17. **Where the respondent takes no appeal.**—at least where he files no transcript and assigns no errors—the judgment will not be reversed at his instance. *Travers v. Crane*, 15 Cal. 12.

18. **On appeal, the Supreme Court notices only the errors committed against the appellant, not those committed against the successful party.** *Frank v. Doane*, 15 Cal. 304.

19. **On appeal by a plaintiff from an order overruling a motion for a new trial made by him on the ground of insufficiency of the evidence to justify the verdict, an exception taken by defendant on the trial to the competency of a witness who testified for plaintiff, will not be considered.** *Peters v. Jackson*, 21 Cal. 636.

20. **Mere technical exceptions will be disregarded.**—Where the judgment seems right on the merits, this Court will not sustain mere technical exceptions taken in the course of the trial, unless compelled by law so to do. *English v. Johnson*, 17 Cal. 107.

21. **Exceptions to evidence, when reviewed.**—Where a party objects to the admission of testimony on trial, he must state the point of his objection at the time. General objection will not do. The party should lay his finger on the point at the time of trial, otherwise this Court cannot review it. *Martin v. Travers*, 13 Cal. 243.

22. **Where a defendant's objection to the admission of testimony on the trial is general, he cannot be permitted to make it special for the first time in this Court.** *People v. Glenn*, 10 Cal. 32.

23. **An objection to the sufficiency of evidence should be made at the time the same is offered to be introduced, so that a party may have the opportunity of supplying the necessary evidence.** *Goodale v. West*, 5 Cal. 339; *Mott v. Smith*, 16 Cal. 533.

24. **An exception to the admissibility of a deed in evidence must be taken on the trial of the cause, at nisi prius. The point cannot be considered on appeal.** *Pearson v. Snodgrass*, 5 Cal. 478; *Posten v. Rasette*, *Id.* 467.

25. **Where the objection to the introduction of testimony was in general terms that it was irrelevant, the objection will not be considered in the Supreme Court, if the testimony could, under any possible circumstances, have been relevant.** *Dreux v. Domec*, 18 Cal. 83.

26. **A party cannot, by consenting to admit evidence "subject to all legal exceptions," absolve himself from the necessity of taking exceptions to the**

relevancy or sufficiency thereof, and devolve the responsibility of discovering whatever objections may exist on the Court below, and after fishing for a verdict, for the first time assign his objections in the Supreme Court. *Covilland v. Turner*, 7 Cal. 38.

§ 189. *The point of exception shall be particularly stated, etc.*

The point of the exception shall be particularly stated, and may be delivered in writing to the Judge; or, if the party require, it shall be written down by the clerk. When delivered in writing, or written down by the clerk, it shall be made conformable to the truth, or be at the time corrected until it is so made conformable. When not delivered in writing, or written down as above, it may be entered in the Judge's minutes, and afterwards settled in a statement of the case, as provided in this Act; *provided*, that if the Judge shall, in any case, refuse to allow an exception in accordance with the facts, any party aggrieved thereby may petition the Supreme Court for leave to prove the same, and shall have the right so to do, in such mode and manner, and according to such regulations as the Supreme Court may, by rules, impose.

¹Amended 1863, 360. See further, 190 *post*.

[See § 195, *post*, note No. 85, as to the practice where a Judge refuse to allow an exception.]

§ 190. *No particular form required.*

No particular form of exception shall be required. The objection shall be stated, with so much of the evidence, or other matter, as is necessary to explain it, but no more; and the whole as briefly as possible.

1. *Exception, sufficiency of.*—A general objection to the admissibility of evidence is insufficient. *People v. Apple*, 7 Cal. 290; *Kiler v. Kimbal*, 10 Id. 268; *Martin v. Traverse*, 12 Id. 245. It is not good unless the evidence objected to be absolutely incompetent, in which case such general objection is available. *Nightingale v. Scannell*, 18 Cal. 315.

2. Where the objection to the introduction of testimony was in general term that it was irrelevant, the objection will not be considered in the Supreme Court, if the testimony could under any possible circumstances have been relevant. *Dreux v. Domec*, 18 Cal. 83.

3. Where the objection made to testimony is that it is incompetent and illegal, without a specification of the points of incompetency or illegality, it is the duty of the Court to overrule it if it is admissible for any purpose. *Sneed v. Osborn*, 25 Cal. 619.

4. Where error is alleged in the exclusion of testimony, it must clearly appear on the face of the exception that the testimony was, not that possibly it might have been, relevant. *Cohn v. Mulford*, 15 Cal. 50.

5. An exception, showing that the Court ruled out the proffered statements of the vendor of personal property, subsequent to his sale, without showing what

the statements were, is insufficient. The exception must show the statements to have some pertinency to the matters in issue. *Id.*

6. Where a party objects to the admission of testimony on trial, he must state the points of his objection at the time. General objection will not do. The party should lay his finger on the point at the time of trial, otherwise this Court cannot review it. *Martin v. Travers*, 12 Cal. 243, *Leet v. Wilson*, 24 Id. 399. See *Roberts v. Chan Tin Pen et al*, 23 Id. 259.

7. Where the objection to impeaching evidence was general, and the Court excluded the testimony without assigning any reason, the Supreme Court will presume in favor of the correctness of the action of the Court below; and the appellant must show error to his prejudice, by putting his exceptions in the proper shape. *Baker v. Joseph*, 16 Cal. 177.

8. What bill of exception should and should not embody.—It is not necessary to embody matter of record in a bill of exception. *Johnson v. Sepulveda*, 5 Cal. 151.

9. Documents and affidavits, to be reviewed by the appellate Court, must be embodied in a bill of exceptions or record. *Gates v. Buckingham*, 4 Cal. 286.

10. Affidavits as to the incompetency of a juror must be embodied in a bill of exceptions, to be reviewed by the appellate Court. *People v. Stoncifer*, 6 Cal. 411.

11. Where the Court below charged the jury, among other things, that if they found for plaintiff, he was entitled to recover the value of the use and occupation from October, 1853—a period long anterior to the commencement of the action, the complaint not containing any averment as to the time when plaintiff's title accrued or existed, etc.—and the defendant excepted generally to all the charge, and followed this general exception up by a specification of certain portions of the charge to which his exception was particularly directed: *Held*, that this general exception did not cover the charge as to damages. *Payne v. Treadwell*, 16 Cal. 248.

12. Where an exception is taken to the decision of a Court refusing a nonsuit, it devolves upon the plaintiff, on the settlement of the bill, to see that all the evidence material for him in sustaining the decision complained of is inserted in the bill of exceptions. *Per BARNETT, J. Ringgold v. Haven*, 1 Cal. 108.

13. Exception before a referee.—A trial before a referee should be conducted in the same manner as before a Court, and the evidence should be embodied in a bill of exceptions and certified by the referee. *Goodrich v. City of Marysville*, 5 Cal. 431: *Phelps v. Peabody*, 7 Id. 52.

14. When the referee excludes proper testimony, or admits improper evidence, or does any other act materially affecting the rights of either party during the progress of the trial before him, then such party should except, and see that the exception is truly stated in the report. *Branger v. Chevalier*, 9 Cal. 362.

15. Mode of reserving question of law.—Where the Court below tries the case without a jury, the proper mode of reserving questions of law is to ask the Court to decide them, and note the refusal in a bill of exceptions. *Griswold v. Sharps*, 2 Cal. 17.

16. Where plaintiffs, having excepted to the ruling of the Court excluding certain evidence, take, in consequence of such ruling, a nonsuit with leave to move to set aside, they do not waive any of their rights as to the exceptions taken. Objections to the introduction of evidence confined on appeal to the grounds taken below. *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 549. See further, § 184, ante.

§ 191. When deemed excepted to.

When a cause has been tried by the Court, or by referees, and the decision or report is not made immediately after the closing of the testimony, the decision or report shall be

deemed excepted to on a motion for a new trial or on appeal, without any special notice that an exception is taken thereto.

1. A report which is not made immediately after the close of the testimony, by the one hundred and ninety-first section of the Practice Act, is deemed as excepted to. *Headley v. Reed*, 2 Cal. 322.

2. In case a decision or report by the Court or referees is made immediately after the close of the testimony, it may be excepted to. Such exception is not necessary to be taken in order to entitle the objecting party to move for a new trial on any of the grounds specified in the Act, or to maintain his appeal, if the facts found do not warrant the decision. *In the matter of the Will of D. G. Bowen*, Jan. T. 1868.

3. The one hundred and ninety-first section of the Practice Act, allowing an exception to the decision of a Court or referee, does not do away with the necessity of asking the Court to find the facts or the omitted facts, and actually excepting to the refusal to do so. *Lucas v. City of San Francisco*, 28 Cal. 591.

TITLE XIX.

NEW TRIALS.

SECTION 192. New trial defined.

193. When new trial may be granted.

194. When application for new trial to be made upon affidavits or statement.

195. Notice of motion for new trial; when and how statements or affidavits to be made and filed.

196. Motion to be made without delay.

§ 192. *New trial defined.*

A new trial is a re-examination of an issue of fact, in the same Court, after a trial and decision by a jury, Court, or referees.

§ 193. *When a new trial may be granted.*

The former verdict or other decision may be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of said party :

1st. Irregularity in the proceedings of the Court, jury, or adverse party, or any order of the Court, or abuse of discretion, by which either party was prevented from having a fair trial.

2d. *Misconduct of the jury, and whenever any one or more of the jurors shall have been induced to assent to any general or*

special verdict, or to a finding on any question or questions submitted to them by the Court, by a resort to the determination of chance; such misconduct may be proved by the affidavits of any one or more of the jurors.

3d. Accident or surprise, which ordinary prudence could not have guarded against.

4th. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

5th. Excessive damages, appearing to have been given under the influence of passion or prejudice.

6th. Insufficiency of the evidence to justify the verdict, or other decision, or that (it) is against law.

7th. Error in law, occurring at the trial and excepted to by the party making the application.

Amended 1862, 33. N. Y. Code, § 364.

1. First subdivision.—A new trial will be ordered when there is such irregularity in the proceedings that the ends of justice will be better subserved. *Sanctisone v. Brown*, 5 Cal. 58.

2. Where a judgment is rendered at nine A. M. upon a summons citing defendant to answer at ten A. M.: *Held*, that the judgment is irregular, and a new trial will be ordered. *Parker v. Shephard*, 1 Cal. 132.

3. A verdict of a jury will not be set aside on the ground that one of the jurors "knew and was aware of the circumstances connected with the affair," the subject matter of the suit, when no objection to him was made until after the verdict was rendered, and it not appearing that he had formed or expressed an opinion before the trial, or was in any way biased in favor of the plaintiff. *Lawrence v. Collier*, 1 Cal. 37.

4. As to new trial because of an incompetent juror. *Thompson v. Paige*, 16 Cal. 77.

5. Where a jury are instructed to bring in a sealed verdict, and they retire, and, after agreeing upon the verdict, seal it up and give it to the officer in charge of them—the clerk being absent—and request him to give it to the clerk, which is done; and after the meeting of the Court the following morning, the verdict is opened, in the presence of the jury, and read by the clerk without exception: *Held*, that this is not an error sufficient to warrant a new trial. The possession by such officer left the verdict as much in the possession of the Court itself as if it had been directly delivered to the clerk. *Paige v. O'Neal*, 12 Cal. 483.

6. Under any circumstances, the withdrawal of a juror and the continuance of a case thereby is no ground for reversing a judgment subsequently obtained. *Benedict v. Coxson*, 4 Cal. 382.

7. After a jury have once retired, it is error to allow them to come into Court and receive instructions in the absence of the parties or their counsel. *Redman v. Gibson*, 5 Cal. 148.

8. Unless the irregularity complained of in the formation of the jury goes to the merits of the trial, or leads to the inference of improper influence upon their conduct, their verdict should not be disturbed. *Thrall v. Smiley*, 9 Cal. 538.

9. Questions of discretion of the Judge below cannot be reviewed in the Supreme Court, except in cases of gross abuse to the injury of the party. *Smith v. Elliott*, 15 Cal. 26.

10. Where the facts show that the action of the Court below approached nearly

to an arbitrary exercise of its discretion, that action will not be reviewed, unless there has been a motion for a new trial. *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 162.

11. Lower Courts have an enlarged discretion in the conduct of the business before them; and with this discretion the appellate Court will not interfere, unless it affirmatively appear that injustice has been done. *Broadus v. Nelson*, 16 Cal. 80.

12. Two defendants filed a joint plea of the Statute of Limitations, and the plea being held bad as to one defendant, the Court, on the trial, permitted the other defendant to file a separate plea of the statute. *Held*, that this was no such gross abuse of discretion as to enable the Supreme Court to revise it. *Robinson v. Smith*, 14 Cal. 254.

13. The allowance of an amendment to pleadings is a matter of discretion, for the abuse of which only can the appellate Court interfere. *Gillan v. Hattison*, 16 Cal. 156.

14. The allowance to file an answer after demurrer overruled rests in the discretion of the Court below, subject to review, of course, in case of its arbitrary or unreasonable exercise. *Thornton v. Borland*, 12 Cal. 439.

15. The discretion of the Probate Court in certifying an issue of fact joined therein for trial to the District Court, is subject to review by the Supreme Court; and, in case of gross abuse, would be corrected. *Keller v. Franklin*, 5 Cal. 432.

16. It rests in the discretion of the Court to allow further evidence to be introduced after the testimony is closed. *Mowry v. Starbuck*, 4 Cal. 274.

17. Other instances.—Where, in an action for personal property, with damages for its detention, the verdict was for defendant, and subsequently the Court below made an order granting a new trial, from which order defendant appealed to the Supreme Court, giving an undertaking for damages and costs under the three hundred and forty-eighth section of the Practice Act, and when the Court below, against the objection of the defendant, proceeded to try the case a second time, when plaintiff had verdict and judgment: *Held*, that the judgment must be reversed, because the Court below could not proceed with a second trial until the appeal from the order was determined. *Ford v. Thompson*, 19 Cal. 118.

18. Where it is evident that the jury must have acted under a mistaken impression as to the legal effect of the evidence, or in total disregard of it, a new trial will be ordered. *Minerva v. Burr*, 20 Cal. 48.

19. The fact that the officer having charge of the jury, after they had retired to deliberate, was absent some minutes from the room in which he had placed them, it not appearing that they were allowed to separate; and the fact that some person outside the jury room spoke to a juror, and that some of the jurors spoke to two persons outside, it not appearing what was said or that it had any reference to the trial; and the fact that after the jury had agreed upon their verdict, and were brought into the Court room, they were allowed to remain there in the presence of other persons while the officer went to the porch in front of the Court room and waited some minutes for the Judge, it not appearing that any communication was had with the jury in the meantime, are not sufficient grounds for requiring a new trial. *People v. Boyge*, 20 Cal. 432. [Affirmed in *People v. Symonds*, 22 Id. 353.]

20. Where the interference of strangers with the jury is unattended with corruption in the latter, and has not been prompted by a party, and it does not appear that any injustice has thereby been done, the verdict will not be disturbed, whether the case be civil or criminal, a capital trial or otherwise. *Id.*

21. What latitude shall be allowed to a plaintiff in introducing evidence in rebuttal after defendant has rested, is entirely discretionary with the trial Court, and its action in this respect is not subject to review upon appeal. *Brooks v. Crosby*, 23 Cal. 42.

22. Where a demurrer is interposed to an answer, and the cause is tried by the Court without first disposing of the demurrer, and no objection is made at the time of trial, it is not such an irregularity as entitles the plaintiff to a new trial. *Calderswood v. Travis*, 23 Cal. 335.

Mis or prejudice on the part of the Judge constitutes no legal incapacity to sit on the trial of cause; nor is it a sufficient ground to authorize a change of the place of trial. *The People v. Wm. Williams*, 24 Cal. 34.

23. If the Court, after the case is submitted, examines books of account as evidence, which have not been given in evidence during the trial, a new trial will not be granted for the irregularity, unless it is stated in the records to be one of the grounds on which the motion will be made. *Wilcoxon v. Burton*, 37 Cal. 237.

24. A new trial will not be granted in a criminal case because a sheriff takes charge of the jury where a deputy sheriff was sworn, nor because the Judge informs the jury, through the sheriff, that if they do not agree in five minutes they must remain in the jury room over night. *People v. Hughes*, 29 Cal. 267.

25. The bare fact that evidence is brought to the notice of the jury out of its regular order, is no ground for a new trial, if the evidence would have been competent in any stage of the trial. *Rice v. Cunningham*, 29 Cal. 492.

26. Where the judgment of the appellate Court directs the Court below what judgment to render, a new trial in the Court below is not authorized, and a judgment rendered upon such a new trial is null and void. *Argenti v. City of San Francisco*, 30 Cal. 458.

27. Where the Court overrules an objection to the admissibility of evidence, and admits the evidence, but when the findings come to be drawn changes its opinion and comes to a different conclusion from that entertained when the evidence was admitted, thereby depriving the party of the opportunity to amend his pleadings or introduce other evidence, a new trial will be granted. *Carpentier v. Small*, April T. 1886.

28. Second subdivision.—Where the jurors agree each one to mark down the sum he thinks proper to find as damages, and then to divide the total amount of these sums by the number of persons composing the jury, which result should be their verdict, a verdict thus formed is irregular, and will be set aside. *Wilson v. Berryman*, 5 Cal. 44.

29. But if such means be adopted merely to arrive at a proper result, for the purpose of determining what the verdict shall be, without any being bound thereby, and afterward the jury agree upon such sum as their verdict, the Court will not disturb it. *Id.*

30. Such verdicts are regarded in the same light as gambling verdicts. *Id.*

31. The remark of a juror, during a recess of the trial, that there was no use in taking up time in trying to humbug the jury, and that the lawyer who made the shortest speech would win the case, was not such misconduct as will vitiate the verdict. *Taylor v. California Stage Co.*, 6 Cal. 228.

32. Where a slip from a newspaper was handed by a deputy sheriff to the jury, during the progress of the trial, containing matters relating to the trial, but not in evidence, and was perused by them, and the Court subsequently, upon discovery of the fact, instructed the jury that the slip was not in evidence, and that it should be wholly disregarded by them, and it appeared that the perusal could not, from the character of the matter contained in the slip, have prejudiced the losing party: Held, not to be a ground for a new trial. *Thrall v. Smiley*, 9 Cal. 529.

33. The amendment of 1862 to section 193 of the Practice Act, allowing the affidavits of the jurors to be received to impeach their own verdict, relates merely to the remedy, and governs in all applications for new trials made after its passage, although the verdict and judgment sought to be set aside were rendered previously. *Donner v. Palmer*, 23 Cal. 40.

34. The verdict to which the assent of any of the jurors was obtained by a resort to chance will be set aside. *Id.*

35. The affidavits of jurors cannot be received for the purpose of impeaching their verdict, unless it is a chance verdict within the meaning of the second subdivision of the one hundred and ninety-third section of the Practice Act. *Turner et al. v. Tuolumne County Water Co.*, 25 Cal. 400.

36. The jury entered into an agreement that each should mark down upon a separate piece of paper the amount which he thought the plaintiffs were justly entitled to recover, and that the several sums thus marked should be added together and the total amount divided by twelve, and that the quotient,

whatever it might be, should be their verdict, without further consultation or discussion. *Held*, that this was not a chance verdict, within the meaning of the second subdivision of the one hundred and ninety third section of the Practice Act. *Held*, further, that such verdict was vicious, and should be set aside if the facts were proved by competent testimony. *Id.*

37. A verdict which is arrived at by each one of the jurors marking such sum as he thinks proper, and then adding the several sums together and dividing the total by twelve, and making the quotient the verdict, is not a chance verdict within the meaning of the second subdivision of section one hundred and ninety-three of the Practice Act. *Boyes v. California Slags Co.*, 25 Cal. 473.

38. The verdict of a jury cannot be impeached by the affidavits of the jurors, except when the verdict is arrived at by a resort to the determination of chance. *Id.*

[See opinion of the Court on petition for rehearing in this case.]

39. The affidavits of jurors cannot be received to impeach their verdict, except when the verdict is arrived at by a resort to the determination of chance. *People v. Hughes*, 29 Cal. 257.

40. Third subdivision.—Surprise is not of itself ground for a new trial or a reduction of damages. To authorize a new trial or reduction of damages, the surprise alleged must be such that ordinary prudence could not have guarded against it, and the proceeding which creates it must have prevented the presentation of the case upon its merits. With the allegation of surprise the party must show that he has been injured by it. *Patterson v. Ely*, 19 Cal. 28.

41. Where the motion for a new trial is made on the ground of surprise, the affidavits on which the motion is founded should set forth particularly and distinctly the facts which the party expects to be able to prove by his witnesses on a new trial: *Held*, where the affidavits did not set forth the facts to which the party expected his witnesses would testify, that a new trial was properly refused. *Rogers v. Hine*, 1 Cal. 429.

42. The affidavits of the witnesses themselves should also, if practicable, be procured, setting forth the facts within their knowledge, to which they can testify in case a new trial should be granted. *Id.*

43. Mere surprise at the evidence given by the witnesses of the defendant is not sufficient ground for granting the plaintiff a new trial. He should submit to a nonsuit, and not take his chances for a verdict. *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40.

44. A new trial will not be granted on affidavit by a witness of mistake in his testimony on the trial, unless there be a clear showing of mistake; and, further, that it was injurious to the party, and that he had no means or had used due diligence to counteract the mistake or to correct it. *Howe v. Briggs*, 17 Cal. 385.

45. Where a slight degree of prudence would guard against surprise, it is not sufficient ground to allege for a new trial. *Brooks v. Lyon*, 3 Cal. 118.

46. Surprise at the ruling of the Court on the trial, as to the admission of testimony, is not ground for a new trial. *Fuller v. Hutchings*, 10 Cal. 523.

47. Where plaintiffs were permitted to prove and recover on a title other than the one so set up, it was error in the Court below to refuse a new trial, the motion for which was based on affidavit of defendant that he was taken by surprise, arising out of the frame of the pleadings, and that he could have rebutted plaintiff's case but for this surprise. *Eagan v. Delaney*, 16 Cal. 85.

48. Where a motion for a new trial is made on the ground that the party was taken by surprise at the trial by the non-attendance of witnesses, it should appear that the party had used reasonable diligence in endeavoring to procure the attendance of his witnesses at the first trial. *Rogers v. Hine*, 1 Cal. 429.

49. Surprise at the testimony of a witness called by the adverse party, is no ground for a new trial, it not appearing that the party against whom

the testimony was given had been misled by previous statements of the witness as to what he would testify. *Taylor v. California Stage Co.*, 6 Cal. 288.

50. Plaintiff herein having rested his case upon proving his note, and defendant not introducing any proof of his discharge in insolvency, the Court below instructed the jury to find for plaintiff, and afterwards set aside the verdict and granted a new trial: *Held*, that this Court will not revise the decision of the Court below in granting a new trial; that defendant might well have been taken by surprise, and supposed it unnecessary to introduce proof of his discharge. *Smith v. Richmond*, 15 Cal. 501.

51. A party who is unprepared for trial at the time of the calling of the case, should move for a continuance, and if he fail to do this, he waives his want of preparation, and cannot afterwards, when judgment has gone against him, move for a new trial on this ground. *Turner v. Morrison*, 11 Cal. 21.

52. It is not sufficient for a new trial to aver that the party thus represented was ignorant at the time of the trial of the facts. He must show that he could not, with the use of due diligence, unmixed with any negligence on his part, have made himself acquainted with or ascertained the existence of the facts. *Williams v. Price*, 11 Cal. 213.

53. The mistake of counsel as to the competency of a witness is no ground for granting a new trial. *Packer v. Heaton*, 9 Cal. 571.

54. Where one party to an action is misled by the act of the other, justice demands that a new trial should be granted. *Pinkham v. McFarland*, 5 Cal. 127.

55. In order to move for a new trial upon the ground of surprise, it must be shown not only a surprise, but one that ordinary prudence could not guard against; and to show that he has been injured by it; to show that upon a new hearing he can make out such a title as would probably be not only a legal but an equitable defense of the action. And he must also show what the title is. *Patterson v. Ely*, 19 Cal. 28.

56. A new trial will not be granted on the ground of surprise at the introduction of false evidence when the evidence related solely to a point not necessarily involved in the decision of the action, and which, in fact, had no influence upon the judgment. *Guy v. Hanly*, 21 Cal. 397.

57. False testimony given by mistake or otherwise is sufficient to avoid a verdict or decision based upon it, if ordinary prudence has been observed by the losing party. *Id.*

58. An affidavit of a party that he was surprised at the admission of a witness on the trial, because his attorney had advised him that the witness was incompetent, and that he was also surprised by the testimony of the witness in stating a certain conversation incorrectly, is not sufficient to authorize the granting of a new trial on the ground of surprise. *Klockenbaum v. Pierson*, 23 Cal. 160.

59. Where, during the progress of a trial, the existence or the materiality of silent evidence is first discovered, the party desiring such evidence should move for a continuance until it can be obtained, and failing to do this, he cannot have a new trial on the ground that the evidence was newly discovered. *Id.*

60. A new trial will not be granted on a showing alone of surprise, which ordinary prudence could not have guarded against, but it must also be made to appear that the moving party has a valid defense to some material part of the plaintiff's cause of action, and that on the new trial the result may be different from that on the first trial. *Cook v. De La Guerra et. al.*, 24 Cal. 237.

61. When a plaintiff fails to appear when a cause is regularly called for trial, and at defendant's request the trial proceeds and judgment is rendered for defendant, the Court has no power to relieve the plaintiff from the judgment under the sixty-eighth section of the Practice Act, on the ground of mistake, inadvertence, surprise, or excusable neglect, on a motion made after the adjournment of the term at which the judgment was rendered. *Casement v. Maggoid*, 28 Cal. 335.

62. If relief can be obtained in such cases, it must be by a motion for a new trial, on the ground of accident or surprise, which ordinary prudence could not have guarded against. *Id.*

63. Where a party to an action, previous to the trial of the same, is told by a witness that he will testify in a certain manner in relation to a fact material to the issue, and the party to whom the declaration is made, relying on the same, neglects to procure other testimony, and secures the attendance of the witness, and when called to the stand, the witness, either by collusion with the party against whom he is called, or by reason of any fact or occurrence for which the party calling him is not responsible, testifies contrary to what he had previously stated he should do; this is a surprise in the sense in which that word is used in the laws of new trials, and a new trial will be granted, provided the party applying for the same shows that he will be able on the new trial to supply the testimony required. In such case it is not necessary for the party surprised to move for a continuance at the time. *Rodriguez v. Comstock*, 24 Cal. 85.

64. The party alleging surprise during the progress of a trial should show it by the best evidence within his reach. *Schellhaus v. Ball*, 29 Cal. 605.

65. If, during a trial, facts exist which amount to legal surprise, these facts should be shown by the affidavits of the attorney, and not of his client. *Id.*

66. On an application for a new trial, on the ground that the Court denied a continuance, in a criminal as well as in a civil case, the defendant should procure the affidavits of the absent witnesses, showing that they can testify to the facts sought to be proved, or give good reason for not obtaining such affidavits. *People v. Jocelyn*, 29 Cal. 562.

67. A new trial will not be granted in a criminal case, on the ground of being taken by surprise by the testimony of a witness, unless the affidavits show that the testimony of the witness was not true. *Id.*

68. A new trial on the ground of surprise should not be granted unless it clearly appears that the verdict is mainly attributable to the facts out of which the surprise resulted, and that the surprise has not resulted from the fault or negligence of the moving party. *Schellhaus v. Ball*, 29 Cal. 605.

69. When, during the progress of a trial, conditions are found to exist which may amount to legal surprise, the Court should, if an application is made therefor, grant relief at once, if the facts are such as would justify the Court in setting aside the verdict after the trial. *Id.*

70. If the party claiming to have been surprised can relieve himself, either by a nonsuit, a continuance, or the introduction of other testimony, or in any other way, and fails to do so, a new trial will not be granted. *Id.*

71. If, during the argument of a case to the jury, a dispute arises between counsel as to whether a certain paper was introduced in evidence, and the Court decides it was, the party claiming to be surprised by the decision should apply to the Court at once for leave to introduce rebutting testimony, if he has such testimony, and, if he fails to do so, a new trial will not be granted. *Id.*

72. The appellate Court will not reverse an order of the Court below denying a new trial, applied for on the ground of surprise, unless there has been an abuse of discretion in the Court below refusing a new trial. *Nooney v. Mahoney*, 80 Cal. 226.

73. In order to sustain a motion for a new trial on the ground of surprise, the moving party must show not only surprise, but that he is injured by it; and this he must do by showing what case he can establish in the event of a new trial. *Brooks v. Douglass*, 32 Cal. 208.

74. Fourth subdivision.—On a motion for a new trial on the ground of newly discovered evidence, the newly discovered evidence should be fully set forth or the motion must be overruled. *Perry v. Cochran*, 1 Cal. 180.

75. An application for a new trial, on the ground of newly discovered evidence, must show affirmatively that the evidence is new, material and not cumulative; that the applicant has used due diligence in preparing his case for trial; and that the new evidence was discovered after the trial, and will be important, and tend to prove facts which were not distinctly in issue on the trial, or even then known or investigated by proof. *Bartlett v. Hodgdon*, 3 Cal. 87; *Brooks v. Lyon*, *Id.* 114; *Burritt v. Gibson*, *Id.* 399; *Live Yanks Co. v. Oregon Co.*, 7 *Id.* 42.

76. It is not good ground for a new trial, that the defendant discovered material testimony at too late a period to produce the same at the trial. It would, however, be good ground on which to base a motion for continuance. *Berry v. Medler*, 7 Cal. 418.

77. In cases of conflicting testimony, newly discovered evidence, merely cumulative, is no ground for a new trial. *Taylor v. California Stage Co.*, 6 Cal. 228.

78. A new trial on the ground of newly discovered evidence, should not be granted where such evidence is merely cumulative, and is that of a witness whose deposition was used on the trial, and particularly where the verdict shows that the jury disbelieved his first statement. *Gaven v. Dayman*, 5 Cal. 342.

79. A party ought not to rely upon his own single unsupported statement, on a motion for a new trial, of the newly discovered evidence, but should, if possible, procure the affidavits of the persons whose testimony he deems material, so that the Court may be satisfied as to what facts he will testify. *Rogers v. Hulse*, 1 Cal. 453. If the affidavits of such persons cannot be obtained in time, additional time should be applied for. *Jenny Lind Co. v. Bowser & Co.*, 11 Cal. 194.

80. Motions for new trial, on the ground of newly discovered evidence, are regarded with distrust and disfavor, and the strictest showing of diligence and all other facts necessary is required. This is especially true when the new testimony is to impeach a witness on the trial, or is merely cumulative. The party must show by his own affidavit that he did not know of this evidence, and could not by due diligence have obtained it; the affidavit of a witness is not sufficient. [In this case the party himself was present.] *Baker v. Joseph*, 16 Cal. 180.

81. Where it did not appear that the defendant had made any efforts to have his witnesses subpoenaed or to procure their attendance, until the morning of the day for which the cause was set down for trial, and on which it actually was tried: Held, that the party had not used proper diligence, and that the decision of the District Court refusing a new trial was correct. *Rogers v. Hulse*, 1 Cal. 429.

82. A new trial will not be granted, on the ground of newly discovered evidence, which is alleged to be a deed, recorded in the county recorder's office a year before the trial, and the record of a judgment in the same Court in which the cause was tried. *Weimer v. Lowery*, 11 Cal. 104.

83. Where the report of a referee disclosed some hesitation and doubt in arriving at the conclusions of fact, and after the report had been made up, but before it was filed, the defendant applied to the referee for leave to introduce newly discovered evidence, which was refused, from a doubt as to his powers, he at the same time intimating to the Court, in a supplemental report, that if such newly discovered evidence had been adduced on the trial, the result would probably have been different: Held, under the circumstances, it was error in the Court below to refuse a new trial. *Hoyt v. Saunders*, 4 Cal. 345.

84. A new trial will not be granted because of the discovery of new evidence which is merely cumulative, and which, if produced, would only tend to contradict a witness of the opposing party. *Klockenbaum v. Pierson*, 22 Cal. 160.

85. Where, upon the trial, the genuineness of a signature is put in issue and made the subject of proof, a new trial will not be granted on account of the discovery of new evidence tending to prove the signature a forgery. *Wright v. Carillo*, 22 Cal. 596.

86. When the motion for a new trial is based upon newly discovered evidence, or that the verdict is against evidence, an enlarged discretion is vested in the Court below, and the Supreme Court will rarely interfere with action of the Court below in granting a new trial. *O'Brien v. Brady*, 23 Cal. 243.

87. Newly discovered evidence, which is merely cumulative, affords no ground for a new trial. *Spencer v. Doane*, 23 Cal. 419.

88. The discovery of new evidence, which is merely cumulative, affords no ground for a new trial. *Aldrich v. Palmer et als.*, 24 Cal. 515.

89. When a defendant, whose property has been attached, files an evasive answer under oath, which admits the indebtedness sued on, and then, on a

trial between an intervenor, a subsequent attaching creditor, and the plaintiff, without intimating that he would do so, testifies that the debt was not due, it is sufficient cause for a new trial, on the ground of surprise. *Coghill & Co. v. Marica*, 29 Cal. 673.

90. Fifth subdivision.—The Court will set aside a verdict, where the damages given are unjustifiable. *McDaniel v. Baca*, 2 Cal. 326.

91. It is a proper exercise of power in a Court to grant a new trial, on the ground of excessive damages, where the verdict is grossly inconsistent in its relation to the facts. *Potter v. Seale*, 5 Cal. 410.

92. The rules by which Courts are governed in setting aside the verdicts of juries, on the ground of excessiveness of damages, considered. *Payne v. The Pacific Mail S. S. Co.*, 1 Cal. 33.

93. In an affidavit for a new trial, the allegations of the affiant, that "as he is informed and believes, the damages assessed were excessive, and more than could be recovered on a fair trial of the action," is insufficient as a statement of a meritorious defense upon which to justify any disturbance of the verdict. The facts should be stated from which the Court can perceive whether the damages are excessive, and whether on another trial there would be any probability of a verdict for a less amount, or that there is any defense to the claim. *Patterson v. Ely*, 19 Cal. 28.

94. It is not error in the Court below to refuse a new trial, provided the successful party will consent to a reduction of his judgment. *Chapin v. Bourne*, 8 Cal. 294.

95. An ejectment case tried by the Court found that plaintiff was entitled to the possession of the premises, and that the damages were \$1,566, and gave judgment accordingly. It appears from the evidence that plaintiff was only entitled to one-half, he being a tenant in common with another not a party to the suit, and, on a motion made for the purpose, the Court set aside the judgment and ordered a new trial. The plaintiff concedes that the judgment should not have been for one-half, but insists that he should have been offered to remit the excess, and only on his refusal to grant the new trial: *Held*, that the new trial was properly granted, it being discretionary with the Court; if the judgment had been that plaintiff was entitled to the possession of one-half of the premises as tenant in common with another, this Court might have corrected the judgment as to damages, and made it conformable to the findings. But in this case both correspond. *Clark v. Huber*, 30 Cal. 196.

96. Where damages are laid at a certain sum in a declaration, the judgment will be reversed if the jury render a verdict for a greater sum. *Pulmer v. Reynolds*, 3 Cal. 396. But the excess may be remitted and the judgment stand. *Pierce v. Payne*, 14 Cal. 420.

97. The plaintiff recovered judgment against the defendant for \$1,000, that sum being the amount of damages awarded by a jury before whom the cause was tried. On motion for a new trial, the Judge of First Instance ordered that the judgment should be set aside, and a new trial granted, unless he would consent to remit four hundred dollars of the judgment which had been rendered in his favor. On appeal from this order: *Held*, that this Court had jurisdiction of the appeal, and the order was reversed and set aside. *Payne v. The Pacific M. S. S. Co.*, 1 Cal. 33.

98. It seems that a verdict for \$3,000, in a suit on an attachment bond, where no property has been levied on under the writ of attachment except real estate, in the possession of which the debtor has not been disturbed, will be deemed excessive and reversed on that ground. *Heath v. Lent*, 1 Cal. 410.

99. In an action for a malicious prosecution, wherein an attachment was issued, the jury gave \$15,000, and where no misconduct was shown on the part of the jury, and it was not charged that the verdict was given under the influence of passion or prejudice, the Court could not disturb the verdict, unless it clearly appear that injustice had been done. *Weaver v. Page*, 6 Cal. 685.

100. Where the aggregate value of articles in a lost trunk, as testified to by plaintiff, is \$2,670, and the jury return a verdict for \$350, it is not an abuse

of discretion by the Judge to grant a new trial on the ground of excessive damages. *Julia Gould Hall v. Bark Emily Banning*, Oct. T. 1867.

101. Plaintiff, a woman of color, being desirous to take passage on one of the street cars of defendant, hailed the conductor; he disregarded her signal, and by reason of his declining to stop she was unable to get upon the car. It was also proved, under objections from the defendant, that the conductor, on being urged by a lady passenger in the car to stop for the plaintiff, replied, "We don't take colored people in the cars;" and it was further proved, that there was ample room for plaintiff, and that she was provided with the usual passage tickets, and was ready and willing to pay her fare. There was no proof of any special damage or malice. The jury returned a verdict for the plaintiff for \$500. *Held*, that the damages were excessive. *Pleasants v. N. B. & M. R. R. Co.*, April T. 1868.

102. *Sixth subdivision*.—The general rule is, that the appellate Court will not disturb a judgment, or verdict, or finding, or order denying a new trial or granting a new trial where there is a substantial conflict in the testimony, and no rule of law appears to have been violated. The Supreme Court has often held that it would not interfere with the verdict of a jury on the ground that such verdict is against the weight of evidence, except in extraordinary cases. It is almost impossible for an appellate Court to satisfy itself in a decision upon such matters—so much depends upon the manner, bearing, character of witnesses, and the peculiar circumstances which the transcript fails to preserve, which give value and weight to testimony. *Kimball v. Gearhart*, 12 Cal. 27; 10 Id. 446; 14 Id. 167; *Johnson v. Pendleton*, 1 Id. 133; *Scammell v. Strahle*, 9 Id. 177; *Weddle v. Stark*, 10 Id. 301; *Bensley v. Atwill*, 12 Id. 240; *Ritter v. Stock*, 12 Id. 402; *McGarritty v. Byington*, 12 Id. 432; *Visher v. Webster*, 13 Id. 60; *Stevens v. Irwin*, 15 Id. 504; *Adams v. Pugh*, 7 Id. 150; *Ritchie v. Bradshaw*, 8 Id. 228; *Knowles v. Joost*, 13 Id. 620; *Brown v. Smith*, 10 Id. 508; *Gagliardo v. Hoberlin*, 18 Id. 394; *Lewis v. Cavillaud*, 21 Id. 178; *Oullahan v. Starbuck*, 21 Id. 413; *Tebbs v. Weathercox*, 23 Id. 58; *Preston v. Keys*, 23 Id. 193; *Lubeck v. Bullock*, 24 Id. 338; *Ellis v. Jeans*, 26 Id. 275; *Wilcoxon v. Burton*, 27 Cal. 232; *Wilkinson v. Parrott*, 32 Id. 102.

103. *This rule applies to law and equity cases alike*.—On an appeal from an order denying a new trial in an equity case, the appellate Court, under the system of practice in force in this State, will apply the same rule with reference to balancing conflicting testimony, which it would if it had been an action at law. *Doe v. Valjejo*, 29 Cal. 386.

104. *But this rule does not apply when the evidence in the Court below consisted of depositions*. *Wilson v. Dickson, De Wolfe & Co.*, July T. 1867.

105. *The same rule applies to the report of commissioners appointed to assess the damages and estimate the benefits resulting from the widening of a street, and to the judgment of a Court affirming the report, where the commissioners make a personal inspection of the premises, with even greater force than two verdicts, or findings of a Court based on evidence alone*. *Appeal of Piper*, 32 Cal. 530; *Appeal of Brooks and Josephs*, 32 Cal. 558.

106. *The same rule applies to findings by referees*.—The decision of a referee upon a question of fact will not be set aside, where the evidence upon such question is conflicting, and where the testimony of some of the witnesses, if credited, supports the finding. *Brady v. Brown*, 20 Cal. 520.

107. *A Court has power to set aside the report of a referee and grant a new trial, on the ground that the evidence before the referee was insufficient to justify his decision*. *Cappe v. Brizzolara*, 19 Cal. 607.

108. *Referees' reports and awards*.—When the appellate Court will disturb their reports, findings, awards. See § 187, *ante*, note No. 12.

109. *Other instances*.—The admission by the Court, under the objections of defendants, of improper evidence offered by plaintiff to prove a fact alleged in his complaint, and not denied in the answer, is no cause for granting a new trial. *Wells v. McPike*, 21 Cal. 215.

110. If the verdict is against the weight of evidence, but there is still some evidence to justify it, a new trial will not be granted on the ground that the evidence is insufficient to justify the verdict. *Kile v. Tubbs*, 32 Cal. 333.

111. Where it is evident that the jury must have acted under a mistaken impression as to the legal effect of the evidence, or in total disregard of it, a new trial will be ordered. *Minturn v. Burr*, 20 Cal. 48.

112. Supreme court will not weigh, but will review the evidence, when.—The Supreme Court will not attempt to weigh the evidence and decide between conflicting statements. *Petrie v. Bugbey et al.*, 24 Cal. 419. But it will always review the evidence, if the point is made that the verdict or judgment is contrary to the evidence, and if they find there is a substantial conflict in the same, so that the jury might find either way without becoming obnoxious to the charge of passion, prejudice, misconception or caprice, the verdict will not be disturbed. *Rice v. Cunningham*, 29 Cal. 492.

113. The appellate Court will decline to review the facts of the case, unless an assignment of errors shows that the Court below refused an application for a new trial, made on the ground that the verdict was contrary to evidence, and that only as an appeal from the refusal to grant a new trial. *Smith v. Phelps*, 2 Cal. 121; *Griswold v. Sharpe*, 2 Id. 23; *Whitman v. Sutter*, 3 Id. 179. See further, § 333, No. 1-7.

114. Facts will not be reviewed unless a new trial was asked.—The appellate Court will not review the facts of a case unless a new trial was asked in the Court below. *Brown v. Graves*, 2 Cal. 118; *Smith v. Phelps*, 2 Id. 120; *Griswold v. Sharpe*, Id. 17; *Ingraham v. Gildermester*, Id. 483; *Brown v. Tolle*, 7 Id. 398; *Rhine v. Bogardus*, 13 Id. 78; *Liening v. Gould*, Id. 598; *Hitt v. Peck*, 30 Cal. 280.

115. The findings of the jury on issues submitted to them in an equity case, if not objected to by motion for new trial, or if not set aside by the Court on its own motion, become established facts in the case, and cannot be questioned in the Supreme Court for the first time. *Duff v. Fisher*, 15 Cal. 375.

116. The findings of fact in the Court below will not be reviewed on appeal, unless there was a motion for a new trial; and this, whether the case be in equity or at law, tried by a jury or by the Court. *Gagliardo v. Hoberlin*, 18 Cal. 394.

117. See further, sec. 195 and notes thereunder.

118. When the supreme court will, and will not, set aside a judgment, verdict, finding, or order, on considering the evidence.—Where there is a conflict of testimony on any question of fact, the Supreme Court will not ordinarily disturb the finding, but where the testimony is all one way on any one point essential to sustain the judgment, and the finding is contrary to the evidence, a new trial will be granted. *Lyle v. Rollins et al.*, 25 Cal. 444. Nor will the Court set aside the findings and grant a new trial, on the ground that the findings are not warranted by the evidence, unless the evidence was such that if the questions had been submitted to a jury, the Court would set aside the verdict as contrary to evidence. *Moore v. Murdock*, 26 Cal. 524. But where the findings of the Court are not warranted by the evidence a new trial should be granted. *Bolton v. Stewart*, 29 Cal. 615; also, where there is no evidence upon a point essential to sustain the verdict, a new trial will be ordered. *Cummins v. Scott*, 20 Cal. 83; or where the verdict is so clearly against evidence as to leave no room for doubt. *Hill v. Smith*, 32 Cal. 166; but where the verdict of the jury is clearly against the evidence, a new trial will be awarded. *Bagley v. Eaton*, 8 Cal. 169.

119. If in an action to recover lands, the testimony of five witnesses who know the premises, on a question of damages, is contradicted by one who testifies with respect to a much larger tract, including the premises in dispute, but without knowing their location, it is not such a conflict of testimony as will preclude the appellate Court from setting aside a finding in accordance with the testimony of the one. *Carpenter v. Gardiner*, 29 Cal. 160.

120. The presumption of law is that the evidence warranted the verdict.—If the jury in their verdict necessarily pass on a material question of

not, the appellate Court will not reverse the judgment, on the ground that there was no evidence to warrant the verdict, unless a motion is made for a new trial, and a statement made which shows that no evidence was introduced to prove the fact. The presumption of the law is that there was evidence to sustain every material fact found by the jury. *Doll v. Anderson*, 27 Cal. 250.

121. Where there is no issue tendered in the pleadings upon a material matter, the Court or jury will not be presumed to have found on such matter. *Gifford v. Carvill*, 29 Cal. 589.

122. The Supreme Court is not authorized to presume the finding of a fact not within the issue. *Bernal v. Helm*, Oct. T. 1867.

123. Seventh subdivision.—For error of law excepted to, an appeal lies without motion for new trial. *Rice v. Gashrie*, 13 Cal. 53.

124. The granting a nonsuit on the facts is a question of law, and if the proper exception be taken, may be reviewed on appeal without motion for new trial. *Cravens v. Dewey*, 13 Cal. 42; *Dart v. Rush*, 14 Id. 83.

125. A verdict obtained upon incompetent evidence may be set aside; but this cannot be done if the evidence were admitted without objection; nor can it be done upon the ground that effect was given to the evidence by the jury, even if objected to. *McCloud v. O'Neal*, 16 Cal. 392.

126. On motion for new trial, on the sole ground that the verdict is not sustained by the evidence, the Court below, in passing on the motion, cannot disregard any portion of the evidence before the jury. The question as to the competency of the evidence cannot be raised on such motion. *Id.*

127. In such cases, that which vitiates the verdict is the error of the Court in admitting the evidence; and if the party seeking to set aside the verdict be not in position to take advantage of this error, he cannot object that the evidence was improperly admitted. *Id.*

128. Where improper evidence is submitted to the jury, under objection, a new trial will be granted on appeal, unless the Court can see that such evidence could not possibly have had an effect upon the jury prejudicial to the appellant. *Innis v. Steamer Senator*, 1 Cal. 462. And the presumption is that it was prejudicial. *Id.* 93.

129. In a suit to recover goods on the ground of fraud in the vendee, the admission of evidence that he was insolvent two months after the purchase is not sufficient to reverse the judgment, unless it is clearly shown that the evidence was irrelevant, and injurious to the party objecting. *Coghill v. Boring*, 15 Cal. 213.

130. Where competent evidence was given, which might have had an influence on the mind of the jury in determining whether certain premises in dispute were included within that portion of the *Mission Dolores* which was claimed to be confiscated, or that portion which was said to have been reserved: *Held*, that a new trial should be granted on the ground of the admission of improper testimony. *Santillan v. Moses*, 1 Cal. 92.

131. Whether driving piles in Front street, in the city of San Francisco, (the street being laid out over the waters of the bay) is an obstruction to the free use of the street by the public, is a question of fact for the jury; and when that question was not so submitted, a new trial was granted. *The City of San Francisco v. Clark*, 1 Cal. 386.

132. Although the Supreme Court may be satisfied that the verdict of a jury is reasonable in amount, a new trial will be granted where an erroneous instruction has been given by the District Judge, which may have influenced the verdict. *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 354.

133. The whole charge of a District Judge to the jury should be taken together, and when considered in this way, if it appear that the jury could not have been misled by it, a new trial will not be granted, although some of the instructions may in slight respects be repugnant to each other. *Carrington v. Pacific Mail Steamship Co.*, 1 Cal. 478.

134. Instructions of the Court to the jury must all be taken together, and if, where thus viewed, the case appears to have been fairly presented to the jury, the verdict will not be disturbed. *Duvalle v. Henriques*, 1 Cal. 390.

135. An erroneous construction will be disregarded, if the jury came to the

proper understanding, and rendered a correct judgment. *Haskell v. McHenry*, 4 Cal. 411.

136. Though instructions may not be technically correct, yet if the questions upon which the case turns, seem to have been fairly put to the jury, and the verdict sustained by the testimony, the Supreme Court will not interfere. *Smith v. Harper*, 5 Cal. 329.

137. The Supreme Court will not disturb the instructions of the District Court to the jury, on the ground there was no evidence upon which to base them, when there was some evidence, although it may have been slight. *Petberg v. Gorham*, 10 Cal. 125.

138. **Exceptions to evidence.**—If an objection is taken to evidence by counsel, and the objection is overruled by the Court, and no exception is taken to the ruling, the presumption is that the counsel acquiesced in the ruling. *Turner et al. v. Tuolumne County Water Co.*, 25 Cal. 404.

139. **Special cases of immaterial errors, in admitting or excluding evidence.**—To entitle an objection to notice, it must not only be on a material matter, affecting the substantial right of the parties, but its point must be particularly stated. The party must lay his finger on the point of his objection. *Kiler v. Kimbal*, 10 Cal. 267.

140. A new trial will not be granted on account of the admission of improper evidence to prove a fact not material to the decision of the action, and independent of which, the verdict is supported. *Clark v. Lockwood*, 21 Cal. 220.

141. A judgment will not be reversed on account of the admissions of improper evidence which is mere surplusage and immaterial to the issues. *Mills v. Barney*, 22 Cal. 240.

142. A., a witness for plaintiff, when cross-examined, was asked questions by defendant, which, on plaintiff's objection, were erroneously ruled out by the Court. Defendant afterwards called the same witness and asked the same questions, which were answered without objection. *Held*, that the judgment would not be reversed by reason of the error committed by the Court, as defendant had suffered no injury thereby. *Hicks v. Whiteside*, 23 Cal. 404.

143. If the Court errs in the admission of testimony during the trial, but afterwards instructs the jury to disregard such testimony, the error is not sufficient to entitle the party objecting to the testimony to a new trial. *Union Water Co. v. Cray*, 25 Cal. 507.

144. If in the course of a trial a portion of plaintiff's evidence is excluded by the Court, and a nonsuit is granted and judgment rendered for defendant, and an order afterwards made granting a new trial, from which defendant appeals, and the record contains the evidence excluded, and the Court of review comes to the conclusion that if the evidence excluded had been admitted plaintiff could not have recovered, the order granting a new trial will not be reversed. *Merle v. Mathews*, 26 Cal. 467.

145. A Court of review will not reverse the judgment of an inferior tribunal for errors committed in excluding evidence, if the evidence excluded is contained in the record, and it appears that the party complaining would not have been entitled to recover if the evidence had all been admitted. *Id.*

146. If incompetent testimony is admitted without objection, the Court will treat the testimony as competent on motion for nonsuit, and on motion for new trial. *Janson v. Brooks*, 29 Cal. 214.

147. If the Court refuses to allow the defendant to amend his answer, and then allows him to introduce his evidence on the point to which the amendment referred, and it appears from such evidence, and the facts found upon other issues, that the amendment is material, no injury results from the refusal, and judgment will not be reversed on that ground. *Jones v. Block*, 30 Cal. 227.

148. If there is uncontradicted testimony sufficient to warrant the verdict of the jury, the judgment will not be reversed because there was some irrelevant testimony admitted upon the point in issue. *Zeigler v. Wells, Fargo & Co.*, 28 Cal. 263; nor,

149. If the verdict is against the weight of evidence, but there is still some evidence to justify it. *Kile v. Tubbs*, 52 Cal. 322; nor,

150. If the evidence was conflicting, even though the Judge who passed on the motion for a new trial did not preside at the trial, and for that reason declined to review the evidence. *Rice v. Cunningham*, 29 Cal. 492.

151. An erroneous ruling by the Court, in excluding certain testimony, is not a ground for a new trial where, from the mode of submission to the jury and their finding, it is evident that the testimony offered could have had no influence upon the verdict. *Carpenter v. Norris*, 20 Cal. 437.

152. The objection that the evidence does not warrant the judgment, can be entertained only on motion for a new trial. *James v. Williams*, 31 Cal. 211.

153. Giving a wrong reason for a decision.—An order granting a new trial will not be reversed because the reason assigned for granting it is a bad one, provided there was a good reason for granting the same. *Bolton v. Stewart*, 29 Cal. 615.

154. The appellate Court, in reviewing an order granting a new trial, is not confined to the reasons assigned by the Court below in granting it. *Id.*

155. If the Court below makes an order granting a new trial, and for any cause the order was correct, the appellate Court will not set it aside because the reason assigned for it may have been wrong. *Grant v. Moore*, 29 Cal. 644.

156. An order granting a new trial does not stand or fall upon the reasons which the Court making the order assigned for it, but upon all the facts in the record. *Coghill & Co. v. Marks*, 29 Cal. 673.

157. Immaterial error, other instances.—It is useless to put parties to the additional trouble and expense of a new trial, when we see clearly that after, perhaps, a protracted litigation, the result must be the same. *Tohler v. Robson*, 1 Cal. 213; *Smith v. Compton*, 6 Id. 26.

158. A new trial will not be granted where the evidence shows that a case cannot be made out, and it would consequently be a useless expense. *Simol v. Hepburn*, 1 Cal. 285. A new trial will not be granted for an error by which the rights of the party were not prejudiced. *Kilburn v. Ritchie*, 2 Cal. 148; *Tyler v. Green*, 28 Cal. 206; *Carpentier v. Gardner*, 24 Cal. 160.

159. Where the instructions of the Court, though incorrect in law, are all in favor of the defendant, he cannot complain of the error. *Gaven v. Dopman*, 5 Cal. 342.

160. An error in an instruction which does not militate against the appellant, or a mere want of perspicuity on the part of the Court below in framing instructions, is not a ground of reversal. *People v. Moore*, 8 Cal. 94.

161. A new trial will not be ordered because of inaccuracy in the language of a finding of fact, when it is sufficiently distinct as to the material question involved in the action. *McKinney v. Smith*, 21 Cal. 374.

162. A new trial will not be granted on account of the giving of instructions to the jury which could not have injured the party complaining. *Tompkins v. Makoney*, 32 Cal. 231.

163. A judgment will not be reversed for an error favorable to the appellant. *Wilkinson v. Parrott*, 32 Cal. 102.

164. Where a new trial has been granted by the District Judge, in the absence of an affirmative showing of error, his ruling will be deemed correct. *Page v. O'Brien*, Oct. T. 1866.

165. Special cases, where new trials were granted, judgments modified, etc.—Where the merits of the case were not investigated in the lower Courts, by reason of an uncertainty as to the proper mode of proceeding under the anomalous provisions of the Practice Act relating to interventions, the Supreme Court awarded a new trial, although the decision of the Court below upon the main question involved was approved, and the only error disclosed might have been cured by a direction to modify the judgments. *Speyer v. Ihmels*, 21 Cal. 280.

166. When the complaint, evidence as admitted, the verdict, and judgment, are in harmony, but the judgment is erroneous by reason of a wrong construction given to the description of land in a deed in evidence, the Supreme

Court cannot modify the judgment, but will reverse it and grant a new trial. *Hicks v. Coleman*, 25 Cal. 145.

167. Where several defenses are pleaded, either of which is good in law, and the verdict is for the defendants, and the Court errs in its instructions to the jury as to one of the defenses, the judgment will be reversed, unless it is made to appear that the verdict was rendered on one of the defenses in relation to which no error was committed. *Wiseman v. McNulty et al.*, 25 Cal. 234.

168. If a defense should be specially pleaded, the omission to plead it is not cured by the introduction without objection of evidence in support of it, and the finding of the fact in relation to it by the Court. *McComb v. Reid*, 28 Cal. 281; *Smith v. Owens*, 21 Cal. 11.

169. Where the jury, without particular instruction from the Court, return a verdict payable in gold coin, though there was no evidence that either on or after striking a balance between the parties the defendant promised in writing to pay in gold coin, a new trial will be granted. *Howard v. Bates*, Oct. T. 1887. See further, post, § 245, Nos. 41-45.

170. **New trial in equity cases.**—The Practice Act applies as well to legal as equitable actions, so far as its provisions are consistent with the rights and remedies administered in Courts of equity. And the only way in which the verdict of a jury on issues submitted can be reviewed, is by motion for new trial—except, probably, that the Court, whether sitting in equity or on the trial of a common law action, may, of its own motion, set aside the verdict of a jury when clearly and palpably against the evidence. *Duff v. Meier*, 15 Cal. 375.

171. There is no substantial difference between a rehearing in an equity case, which opens the decree and places the case before the Court for trial anew, and a new trial in a case at law, tried and decided by the Court. *Biddle v. Baker*, 13 Cal. 295.

172. The Court below may refuse a new trial, even though both parties consent to it. Such refusal to grant a new trial is no ground of error, particularly in an equity case where there may have been no necessity for a new trial; as upon application to the Court upon the pleadings and facts before it, the proper decree might have been rendered, notwithstanding the verdict; or, if refused, the error corrected by appeal. *Phelan v. Ruiz*, 15 Cal. 90.

174. If no appeal is taken from an order denying a new trial, the appellate Court cannot review the evidence to determine whether the verdict or findings are sustained by it. The practice is the same in all cases, whether at law or in equity. *Green v. Butler*, 26 Cal. 599.

175. **When equity will and will not interfere.**—Where a party moves for a new trial and fails, he cannot, on the same facts, go into equity and enjoin the judgment rendered. *Collins v. Butler*, 14 Cal. 226.

One who buys land during the pending of an action against his grantor to recover possession of it, with a notice of the suit, and neglects to defend it until judgment is obtained against his grantor, and then neglects to move for a new trial, cannot obtain a new trial in a Court of equity. *Mastick v. Thorp*, 29 Cal. 444.

176. A Court of equity will not grant a new trial in an action at law where the applicant knew of the rendition of the judgment against him in the law action in time to have moved for a new trial in the law Court. *Id.*

177. A party cannot maintain an action in a Court of equity to set aside a judgment against him rendered in a Court of law, and obtain a new trial, without showing that he had no opportunity to move for a new trial in the law Court, by reason of some mistake, accident, or surprise, unaccompanied by any fault or negligence on his part. *Id.*

178. Courts of equity will not interfere and set aside a judgment at law, except when it has been obtained by fraud, or through some accident or mistake, without laches on the part of the party complaining, and after all remedy at law has been lost. *Id.* *Boland v. Thornton*, 12 Cal. 441.

179. **Dismissal of a motion amounts to a denial.**—An order dismissing a motion for a new trial is in effect denying a new trial. *Warder v. Mandacno Co.*, 32 Cal. 655.

180. When appeal from an order, etc., will be dismissed.

181. An appeal from an order denying a new trial will be dismissed unless the statement is agreed to by the attorneys of the respective parties or settled and authenticated by the Court. *Coogrove v. Johnson*, 30 Cal. 509.

182. A new trial granted for alleged errors of law, will be reviewed.—When a new trial is granted by the Court below, entirely upon alleged errors of law, the Supreme Court will review the action of the Court below as in other cases. *O'Brien v. Brady*, 23 Cal. 243.

183. Illegal evidence presumed injurious.—Unless the illegal evidence could have no influence upon the verdict, the presumption is that it did have some weight with the jury, and a new trial should be ordered. *Santillan v. Moss*, 1 Cal. 93.

184. Errors occurring at the trial must be specially excepted to at the time.—When there has been no objection raised or exception taken to the insufficiency of the evidence, this Court would presume that sufficient evidence of a proper character was given to warrant the verdict. *Bunting v. Beideman*, 1 Cal. 182.

185. Courts will require an objection to the sufficiency of evidence to be made at the time the same is offered to be introduced, so that a party may have the opportunity of supplying the necessary evidence. *Goodale v. West*, 5 Cal. 341; *Mott v. Smith*, 16 Cal. 533.

186. An objection to a form of a verdict should be made on motion for a new trial. It is too late to raise it in this Court for the first time. *Douglass v. Kraft*, 9 Cal. 562.

187. Where a defendant's objection to the admission of testimony on the trial is general, he cannot be permitted to make it special for the first time in this Court. *People v. Glenn*, 10 Cal. 32.

188. Where the objection to the introduction of testimony was in general terms that it was irrelevant, the objection will not be considered in the Supreme Court, if the testimony could, under any possible circumstances, have been relevant. *Dreuz v. Domec*, 18 Cal. 83.

189. Where an objection is taken to the admission of evidence, without a specification of the grounds of the objection, it does not merit consideration. *Kier v. Kimbal*, 10 Cal. 267.

190. Where instructions to the jury are not excepted to at the time they are given, or refused, and a motion for new trial is made for error in giving or refusing such instructions, they cannot be considered on appeal from the order denying the motion. *Collier v. Corbett*, 15 Cal. 186.

191. A refusal to give an instruction cannot be urged as error for the first time, on a petition for a rehearing on appeal. *Payne v. Treadwell*, 16 Cal. 247.

192. A party cannot take his chances for a verdict on instructions given and refused, without exceptions taken, and then, after verdict, except to the action of the Court upon motion for a new trial. *Letter v. Putney*, 7 Cal. 423; see *St. John v. Kidd*, 26 Cal. 263.

193. An exception to the admissibility of a deed in evidence must be taken on the trial of the cause, *at nisi prius*. The point cannot be considered on appeal. *Pearson v. Snodgrass*, 5 Cal. 478; *Posten v. Rasette*, Id. 487.

194. A party cannot, by consenting to admit evidence "subject to all legal exceptions," absolve himself from the necessity of taking exceptions to the relevancy or sufficiency thereof, and devolve the responsibility of discovering whatever objections may exist on the Court below, and after finding for a verdict, for the first time assign his objections in the Supreme Court. *Coville v. Turner*, 7 Cal. 38.

195. Where the motion for a new trial, though made, does not appear to have been acted on, the appellate Court will not consider the sufficiency of the evidence to sustain the verdict. *Myers v. Casey*, 14 Cal. 542.

196. On appeal by a plaintiff from an order overruling a motion for new trial, made by him upon the ground of insufficiency of the evidence to justify the verdict, an exception taken by defendant on the trial to the competency of a witness who testified for plaintiff, will not be considered. *Pierce v. Jackson*, 21 Cal. 636.

197. The party must lay his finger on the point of his objection.—*Kier v. Kumbal*, 10 Cal. 267; *Martin v. Travers*, 7 Cal. 253.

198. Granting or refusing motion for new trial discretionary.—Motion for new trial is addressed to the sound discretion of the Court, and the Supreme Court can interfere only in cases of plain abuse of such discretion. *Peters v. Foss*, 16 Cal. 357; *Drake v. Palmer*, 2 Id. 181; *Watson v. McClay*, 4 Id. 288; *Hastings v. Steamer Uncle Sam*, 10 Id. 341; *Burnett v. Whitesides*, 15 Id. 36; *Quinn v. Kenyon*, 22 Id. 82; *O'Brien v. Brady*, 23 Id. 243.

199. Where the evidence is conflicting, the granting or refusing a new trial rests in the discretion of the Court below, and this Court will not interfere, whether the new trial be granted or refused. *Weddle v. Stark*, 10 Cal. 301.

200. Where, on trial of an ejectment suit, certain evidence offered by defendant was rejected, on the ground that the averment in the answer that the original location of the lot in dispute was according to "the actual plan, then used and recognized, of the town of San Francisco or Yerba Buena, meant the map of the survey, and not the actual survey or plan on the ground, and the Court refused the defendant permission then to amend his answer in this respect, but subsequently granted him a new trial for that purpose: *Held*, that the Court below had the power to grant the new trial of this cause, and that this Court will not interfere. *Lestrade v. Barth*, 17 Cal. 285.

201. The court below may refuse a new trial, even though both parties consent to it.—Where a case has been once fully tried, parties have not an arbitrary discretion to renew the litigation. *Phelan v. Ruiz*, 15 Cal. 90.

202. Motion not acted on.—Where the motion for new trial, though made, does not appear to have been acted on, the appellate Court will not consider the sufficiency of the evidence to sustain the verdict. *Myers v. Casey*, 14 Cal. 542.

203. New trial will be granted when justice requires.—Where, from the record, it appears highly probable that the judgment of the Court below is founded neither upon law or equity, the Supreme Court should reverse the judgment or grant a new trial. *Reed v. Jourdain*, 1 Cal. 102.

204. It is error to refuse a new trial when justice requires that it should be granted. *Ross v. Austill*, 2 Cal. 183.

205. Injury is presumed from evidence erroneously admitted; and the adverse party must show clearly that no injury accrued, or the judgment cannot stand. *Grimes v. Hall*, 15 Cal. 63.

206. The Court may impose terms.—The Court may impose terms upon granting a new trial. *Battelle v. Conner*, 6 Cal. 140.

207. Where a party complies with the terms imposed, and avails himself of the advantage of the order, he cannot afterwards question its correctness. *Id.*

208. The terms of new trials are peculiarly within the discretion of the Court, with the exercise of which the appellate Court will not interfere, except on a clear showing of abuse or grossly unreasonable terms. *Rice v. Gasbrie*, 13 Cal. 54.

209. The Court may require a remittitur of a portion of an excessive judgment, or grant a motion for a new trial. *Benedict v. Cozens*, 4 Cal. 382.

210. When a new trial was to be had on payment of costs: *Held*, that the acceptance of costs did not waive the right to appeal from the order granting a new trial. *Tyson v. Wells*, 1 Cal. 378.

211. It is not error in the Court below to refuse a new trial, provided the successful party will consent to a reduction of his judgment. *Chapin v. Bourne*, 8 Cal. 296.

212. If the findings are not sustained by the evidence on a question of damages, the Court may require the plaintiff to remit the damages, or submit to a new trial. *Carpenter v. Gardiner*, 29 Cal. 160.

213. On motion for a new trial the Court cannot reverse a former judgment.—On motion for new trial, it is irregular for the Court to reverse its first judgment, and render a contrary one, without hearing or notice. *Nicholl v. Hackett*, 14 Cal. 661.

214. Directions to Court below to enter a judgment does not give a new trial.—Where the action is brought to recover judgment upon several demands, and the Court below renders judgment for plaintiff upon all the demands, and the appellate Court, in its opinion, holds that plaintiff's recovery should have been limited to a portion of the demands sued on, and directs the Court below, upon a return of the cause, to render judgment in accordance with the opinion, and reverses the judgment, the judgment of the appellate Court does not direct a new trial of the issues, but directs the Court below to enter judgment upon the findings for the amount due. *Argenti v. City of San Francisco*, 30 Cal. 458.

215. A motion for a new trial can be heard only on the record made and settled before the order is made.—*Quivey v. Gambert*, 32 Cal. 304; *Cosgrove v. Johnson*, 30 Cal. 509.

216. The Supreme Court can only look to the statement as settled by the Court below, to determine the character and point of the objection made on the trial to the introduction of proposed evidence. They cannot consult the opinion of the Judge in passing upon the motion for a new trial, to discover the real point of objection. *Cochran et al. v. O'Keefe*, April T. 1868.

217. Court should rule on motion for new trial.—A party moving for a new trial is entitled to a ruling upon his motion upon the basis upon which it is presented. If his notice or statement has not been filed or served in time, that is good reason why his motion should be denied. *Id.*

218. Rulings in certain cases reviewed without a motion for a new trial.—It seems that errors in the rulings of the Court below will be reviewed on appeal, although no motion for a new trial is made or overruled. *Soule v. Dimes*, 6 Cal. 473; *Allen v. Hill*, 16 Cal. 117.

219. Where plaintiff was nonsuited on the ground that the allegations of the complaint were not sustained by the evidence, and judgment for costs rendered against him, no motion for new trial is necessary. *Dorst v. Rush*, 14 Cal. 81.

220. Where the questions in a case arise upon motion for nonsuit, and upon the action of the Court in giving and refusing instructions, a motion for new trial is unnecessary. *Sullivan v. Cary*, 17 Cal. 80.

221. Stipulations as to statement on appeal.—A stipulation to the effect that a statement may "be used on the motion for new trial in this cause, and also on the appeal to the Supreme Court," includes an appeal from the judgment, as well as an appeal upon the decision for the motion for a new trial. *Hastings v. Hallock*, 13 Cal. 207.

222. Statement on motion for a new trial may be used on appeal from the judgment.—Any statement agreed to by the parties, or duly settled and certified by the Court, becomes a part of the record, the same as a bill of exceptions, demurrer to the evidence, or any other mode by which questions of law or matters of evidence were made part of the record by the old system of practice. And where an appeal was taken from a judgment, and also from an order overruling a motion for a new trial, and the appeal from the order was dismissed, for the reason that the notice was not served in time, and the transcript contained a statement on motion for a new trial, but no statements on appeal or bill of exceptions: *Held*, that on the appeal from the judgment, the statement on motion for a new trial properly formed part of the record, and might therefore be used in the Court, and that any alleged errors appearing therefrom, affecting the judgment, might be considered and passed on. *Thuddy v. Ellis*, 22 Cal. 650.

223. Where a statement is made and settled on motion for a new trial, and an appeal is taken, both from the judgment and from the order denying a new trial, the statement can be used in reviewing the order appealed from, but cannot be used in determining the appeal from the judgment. *Casgraves v. Howland*, 24 Cal. 457.

224. If a statement is made on a motion for a new trial, and an appeal is taken from the judgment, under a stipulation that the statement on motion for a new trial may be used as the statement on appeal, the statement may be

used so far as it presents any question that can be reviewed on appeal from the judgment, but no further. *Carpentier v. Williamson*, 25 Cal. 159.

225. **Motion for new trial may be abandoned.**—Plaintiff recovered judgment, and defendants gave notice of their intention to move for a new trial, and filed a statement of the grounds. Plaintiff filed a counter statement, but afterwards, at a meeting of the parties before the Judge at Chambers to settle the statement, informed the Judge and defendants that the statement need not be settled, as he would consent to a new trial; whereupon, defendants gave notice of a motion to withdraw their motion or proceedings for new trial. Refused, and a new trial granted. *Held*, that the Court erred; that the defendants had a right to move or not to move for a new trial upon the notice given, and if they chose to abandon their proceedings, whether before or after the motion for new trial was made, they had the right so to do. *Stoyell v. Cole*, 19 Cal. 602.

226. **Act governing statements for new trial.**—The Act of 1863, amending the one hundred and ninety-fifth section of the Practice Act, is the law governing the preparations of statements on motion for new trial made after its passage. *Partridge v. San Francisco*, 27 Cal. 416.

227. **As to a motion for a new trial there is no term.**—*Spanagl v. Dellinger*, Jan. T., 1868.

228. **Finding and verdict conclusive as to the facts, if no motion for a new trial.** *Allen v. Fannon*, 27 Cal. 68.

229. **Effect of stipulation that motion for new trial be denied.**—Where the parties in the Court below stipulated that a motion for a new trial should be denied, they cannot question in this Court the correctness of an order denying such motion. *Brotherton v. Hart*, 11 Cal. 405.

230. **Where an attorney appears, without authority, and conducts the defense, the remedy of defendants is by motion for a new trial; not by motion for relief from the judgment under sec. 68 of the Practice Act.** *McKinley et al. v. Tuttle et al.*, Oct. T. 1867.

231. **Affidavits in a foreign language may be excluded.**—It is not error for the Court to exclude affidavits filed on a motion for a new trial, which were written in a foreign language. *Spencer v. Doane*, 23 Cal. 419.

232. **Law of the case.**—Where the Supreme Court, in reversing a judgment and remanding the cause for a new trial, consider and pass upon a point of law, with a view to the new trial for the purposes of which it is important, the ruling upon such point, though not essential to the decision, becomes the law of the case in all its future stages. *Table Mountain Tunnel Co. v. Stranahan*, 21 Cal. 548. The following cases relate to the same subject: *Hubbard v. Sullivan*, 18 Cal. 508; *Saule v. Ritter*, 20 Cal. 522; *Leese v. Clark*, 20 Cal. 397; *Heirs of Nieto v. Carpenter*, 21 Cal. 455; *Table Mountain Tunnel Co. v. Stranahan*, 21 Cal. 548; *Mitchell v. Davis*, 23 Cal. 381; *Moore v. Murdock*, 26 Cal. 524; *Lucas v. San Francisco*, 28 Cal. 591; *Estate of Pacheco*, 29 Cal. 224; *Musford v. Estudillo*, 32 Cal. 131; *Kile v. Tubbs*, 32 Cal. 332; *Argenti v. Sawyer*, 32 Cal. 414.

233. **County court may grant new trial.**—The appellate power of the Supreme Court over the County Court could not be properly or efficiently exercised, unless the power to grant a new trial existed in the County Court. The County Court certainly has power to grant a new trial. *Dickinson v. Van Horn*, 9 Cal. 211. [This case commented on without approval in *Dorsey v. Barry*, 24 Cal. 455.]

§ 194. *When application for new trial to be made upon affidavit or statement.*

When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the last section,

it shall be made upon affidavit ; for any other cause, it shall be made upon a statement prepared as provided in the next section.

§ 195. ¹ *Notice of motion for new trial ; when and how statements or affidavits to be made and filed.*

The party intending to move for a new trial shall give notice of the same as follows : When the action has been tried by a jury, within five days after the rendition of the verdict ; and when tried by a commissioner, referee, or by the Court, within ten days after receiving written notice of the filing of the findings of the commissioner, referee, or Court, when written findings are filed by the Court, or of the rendering of the decision of the Court when no findings are filed ; *provided*, the decision be rendered in open Court, and if rendered at vacation, then within ten days after receiving written notice of the filing thereof ; and when amendments are filed to remedy defects in the findings, within ten days after receiving written notice of the filing of such amendments. The notice shall designate generally the grounds upon which the motion will be made. Within five days after giving such notice, or within such further time, not exceeding twenty days, as the Court or Judge thereof or Court Commissioner may by order grant, the said party shall prepare and file with the clerk the affidavit or statement required by the last section. If no affidavit or statement be filed within five days after the notice, or within such further time as the parties may agree upon, or the Court or Judge thereof or Court Commissioner may by order grant, the right to move for a new trial shall be deemed waived. When the notice designates as the ground upon which the motion will be made the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of the motion errors in law occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded. The statement shall contain so much of the evidence or reference thereto as may be necessary to explain

the particular points thus specified, and no more. Such statement, when not agreed to by the adverse party, shall be settled by the Judge, upon notice. When agreed to, it shall be accompanied by the certificate of the parties or their attorneys that the same has been agreed upon and is correct. When settled by the Judge, the same shall be accompanied with his certificate that the same has been allowed by him and is correct. On the argument reference may also be made to the pleadings, depositions, and documentary evidence on file and the minutes of the Court. If the application be made upon affidavits filed, the adverse party may use counter affidavits on the hearing. Any counter affidavits shall be filed with the Clerk one day at least previous to the hearing. The affidavits and counter affidavits, or the statement thus used in connection with such pleadings, depositions, and minutes of the Court as are read or referred to on the hearing, shall constitute, without further statement, the papers to be used on appeal from the order granting or refusing the new trial. To identify the affidavits, it shall be sufficient for the Judge or clerk to endorse them at the time as having been read or referred to on the hearing. To identify any depositions or minutes of the Court read or referred to on the hearing, it shall be sufficient that the Judge designate them in his certificate as having been thus read or referred to.

¹ Amended 1861, 590; 1863, 643; 1864, 246; 1866, 845. See *ante*, § 193. For San Francisco County, see Rules of Court, Nos. XXVIII-XXIX. Barcroft's Forms, 589; Abb. F. 1672.

1. **Office of a statement.**—The office of a statement on motion for new trial is to bring into the record those matters only, which arise in the progress of the trial, and constitute the basis of the motion under the fifth, sixth, and seventh subdivisions of section one hundred and ninety-three of the Practice Act, and which the appellant desires to have reviewed on appeal from the order granting or refusing a new trial. *Harper v. Minor*, 27 Cal. 109.

2. There is no distinction as to the manner in which a statement is to be prepared between a case at law and a case in equity. The grounds of appeal must in both cases be stated; and in both cases much, if not the greater portion of the evidence, will be immaterial for the determination of these grounds in the Supreme Court. *Barret v. Truickbury*, 15 Cal. 354.

3. **How to avoid making a motion for a new trial.**—In a vast majority of cases there would be no occasion for a motion for a new trial, if the findings were what they ought to be; for in nine cases out of ten, where the trial is by the Court, the sole controversy here is as to whether the conclusions of law are correct. In all such cases there should be, and there certainly need be, no occasion for a motion for a new trial, or for bringing the evidence to this Court in any form. Every such case ought to come here upon the judgment roll. *Truickbury v. Magraff*, Oct. T. 1867.

4. **Three distinct steps to be taken.**—There are three distinct steps recognized by the Practice Act in a proceeding to obtain a new trial, for the taking of each of which, except the last, a particular period of time is allowed: firstly, a notice of intention to move for a new trial; secondly, filing and serving statement or affidavits; thirdly, the motion for a new trial. An order extending the time for taking either of these steps, should express with precision the object to be attained. *Jenkins v. Frink et al.*, 27 Cal. 337.

5. **Notice, what is.**—When the statute speaks of notice of motion, it means written notice, or notice in open Court, of which a minute is made by the Court. *Borland v. Thornton*, 12 Cal. 448.

6. **Thirty days extension of time to serve the notice.**—The time allowed for the service of notices to move for a new trial, may be extended by the Court thirty days. *Harper v. Minor*, 27 Cal. 113.

7. **Notice of motion must be served.**—Notice of intention to move for a new trial must be given to the opposite party or his attorney, within the time required by the one hundred and ninety-fifth section of the Practice Act, or the right to move for a new trial is waived. *Bear River & A. W. & M. Co. v. Bole et al.*, 24 Cal. 354.

8. **Where no notice of an intention to move for a new trial is given to the opposite party, or waived by him, the making and filing of a statement does not give the Court jurisdiction over the subject matter of a new trial, and an order granting a new trial will be reversed.** *Bear River & A. W. & M. Co. v. Bole et al.*, 24 Cal. 354.

9. **Service of notice, how waived.**—On motion for a new trial, the filing of a counter statement is a waiver of objections to want of notice of the intention to move for a new trial. *Williams v. Gregory*, 9 Cal. 76.

10. **If no notice is given of an intention to move for a new trial, a statement made and filed and agreed to by the parties, or settled by the Judge, cannot be made the foundation of a motion, nor annexed to the record of the judgment or order from which the party may appeal.** *Plateau v. Lubeck*, 24 Cal. 364.

11. **Acknowledgement of service of notice.**—An acknowledgement of service indorsed on a notice of appeal as follows: Due service of a copy of the within notice is hereby accepted to have been made this twentieth day of February, 1863, is no waiver of an objection that service upon the day mentioned is too late. *Twedy v. Ellis*, 22 Cal. 650.

12. **A party cannot abandon the first notice of motion, and file a record.** *LeRoy v. Rasette*, 32 Cal. 171.

13. **Presumption that notice of motion was duly given.** *Godehaus v. Mayford*, 26 Cal. 316.

14. **Notice, effect of, as a stay.**—A motion for a new trial, filed within the time allowed by law, stays the operation of the judgment and preserves all rights, until it can be heard and determined, and is not affected by the adjournment of the Court for the term. *Lurvey v. Wells, Fargo & Co.*, 4 Cal. 166.

15. **Pendency of a motion for a new trial, does not operate as a suspension of an injunction.** *Ortman v. Dixon*, 9 Cal. 23.

16. **If, after the Court has filed its finding of facts, and made an order sending the case to the referee to take and state an account, a motion is made for a new trial, the motion will not stay the proceedings pending before the referee.** *Crowther v. Rowlandson*, 27 Cal. 385.

17. **Time within which notice of motion must be given, five days.**—If the notice of motion for a new trial is not served and filed within five days after the rendition of the verdict, where the case is tried by a jury, the right to move for a new trial is waived, and although a statement may be afterwards made, filed, and settled, and the motion for new trial passed on by the Court below, yet the Supreme Court will, if the objection be taken, strike the

statement from the transcript. *Ellsasser v. Hunter*, 26 Cal. 279. A special verdict is within the rule. *Garwood v. Simpson*, 8 Cal. 166; *Duff v. Fisher*, 15 Id. 380.

18. On the rendition of a special verdict, the trial is terminated, and notice of motion for new trial must be given within the statutory time thereafter, or the proceedings based upon such notice will be disregarded. *Allen v. Hill*, 16 Cal. 113.

19. **Ten days.**—Notice of motion for a new trial may be served within ten days after receiving written notice of the rendering of the decision by the Court, if rendered in open Court. *Carpentier v. Thurston*, 30 Cal. 123.

20. The time to serve notice of intention to move for a new trial, does not commence to run till written notice of the rendering of the decision is filed. *Roussin v. Stewart*, Oct. T. 1867.

21. Where the trial was before the Court, without a jury, and it does not appear that the notice of ten days required by the statute was given, the statement cannot be objected to on the ground that it was not filed within the time prescribed by the Practice Act. *Burnett v. Stearns*, Oct. T. 1867.

22. If the case is tried by the Court, and a decision orally announced in favor of plaintiff from the bench, and entered by the clerk in his minutes, and the Judge several days afterwards, in vacation, signs the formal written findings and a draft of judgment, and delivers them to the plaintiff to be filed, a notice served by plaintiff on defendant, on the day of the signing and delivery of said findings and judgment, that the findings have this day been signed by the Judge, and his decision herein rendered in favor of plaintiff, is a notice of the findings and decision thus signed in vacation, and not of the decision first made in open Court. The decision of which notice was thus given cannot be said to have been rendered till it was filed by the clerk and became a record of the Court; and a notice of motion for new trial given within ten days after such filing is in time. *Carpentier v. Thurston*, 30 Cal. 123.

23. Notice of motion for new trial, given one day before judgment rendered, and six days after filing the report of the referee, is ineffectual for any purpose. If the trial terminated with the filing of the report, the notice was not in time; if it continued, in contemplation of law, until the entry of judgment, the notice was premature, and the proceedings on the motion are void. *Mahoney v. Caperton*, 15 Cal. 513.

24. **Time where the case is sent to a referee.**—If the case is tried by the Court, and findings of fact are made and filed, and the case is then sent to a referee to take and state an account, the necessary steps to apply for a new trial should not be taken until the final report of the referee is filed. *Cronther v. Rocklandson*, 27 Cal. 385.

25. **Decisions, when deemed rendered.**—Judgment is rendered when it is announced and entered in the minutes. *Casement v. Ringgold*, 28 Cal. 337; *Gray v. Palmer*, 28 Id. 416; *Peck v. Courtis*, 31 Id. 207; *Genella v. Reises*, 32 Id. 159; *Carpentier v. Thurston*, 30 Id. 123. See further post, § 336, note 1, *et seq.*

26. **Manner of preparing, amending, and settling the statement.**—The statute prescribing the practice in motions for new trials is plain and simple. The moving party prepares his statement and submits it to the opposite party. If satisfactory to him, they add a certificate, which they sign. If not, he proposes amendments and submits them to the moving party, and if they are accepted by him, the statement is then engrossed accordingly, and to the engrossed copy a certificate is added, and signed by them, to the effect that the statement is correct and agreed to by them. If they cannot agree, the statement and proposed amendments are submitted to the Judge, who allows or denies according to circumstances. After the Judge has thus determined what shall constitute the statement, it is engrossed accordingly, and a certificate added to the effect that it is correct, and if not signed by counsel must be signed by the Judge. Nothing can be regarded by the Supreme Court as a statement which is not authenticated in one of these modes. *Cogswell v. Johnson*, 30 Cal. 511.

27. For San Francisco county, see District Court Rules Nos. XXVIII, XIX.

28. Rules to be observed in making the statement.—See further, post, § 338.

29. Documentary and other evidence, how inserted.—Omit all matter that does not seem to illustrate the points made on appeal. *Estate of Boyd*, 26 Cal. 513. Leave out verifications, acknowledgements of deeds, and titles of Court, where no point is made on them. Id. Where the record is certified by the attorneys, it will answer all purposes to say, "Duly verified," "Duly acknowledged," "Title of the cause," etc., substituting the date of the document or filing. Id. See also, to the same effect, 27 Cal. 654.

30. Inserting deeds in a statement.—It is seldom necessary to insert an entire deed in a statement. When the deed is regular, and no question is made on it, it is sufficient to say that a deed was introduced from A to B, showing that A's title had vested in B. *Kimble v. Semple*, 31 Cal. 667.

31. Transcripts of records.—Instead of copying into a statement, for a new trial or on an appeal, deeds and transcripts of records, when no point is made on the construction of the language, a brief statement of the instrument answers every purpose, and is all that the Practice Act requires. *Knowles v. Inches*, 12 Cal. 212.

32. Where documentary evidence is referred to in the statement on motion for a new trial, and directed to be inserted, the appellant cannot, without the assent of the other party, insert copies of the same in the transcript on appeal, unless the statement has been engrossed as settled, and afterwards authenticated, or unless the originals are on the files of the Court or constitute a part of its record, so that they can be authenticated as a part of such record by the certificate of the clerk. *Kimble v. Semple*, 31 Cal. 667.

33. Affidavits.—Affidavits in support of a motion in the Court below will not be considered by the Supreme Court unless they are incorporated in the statement or bill of exceptions. *The People v. Honnell*, 10 Cal. 83.

34. Where the affidavits used in support of a motion for a new trial are not set forth in the record on appeal, the party moving is deprived of all ground of error based on the affidavits; but the omission does not affect his right to raise the question as to errors apparent upon the face of the record. *Branger & Briard v. Chevalier*, 9 Cal. 353.

35. Affidavits or documents copied into the transcript on appeal, but not made a part of the record either by a certificate of the clerk or Judge, or by a statement, or bill of exceptions, cannot be considered. *Gordon v. Clark*, 22 Cal. 533.

36. Documents and depositions which are not embodied in a statement.—Where documents and depositions are read or referred to on the argument of a motion for a new trial in the Court below, and are not embodied in the statement, it will be sufficient for the Judge to add, upon rendering his decision, a certificate of the matters thus read or referred to. This certificate will be sufficient identification of the documents and depositions used; and a copy of them, together with the statement and judgment roll, will constitute the only record necessary in the Supreme Court. *Loucks v. Edmondson*, 18 Cal. 263.

37. If a deed is mentioned in a statement on motion for a new trial as having been in evidence, but is not presented in the statement, the appellant may make it a part of the record on appeal by printing it in the transcript, with a certificate of the Judge that it is the deed referred to in the evidence, and that it was before him on motion for a new trial. *Hess v. Winder*, 30 Cal. 849.

38. The finding of the Court need not be embodied in the statement or bill of exceptions. *Reynolds v. Harris*, 8 Cal. 618.

39. Manner of identification of affidavits, counter affidavits, depositions and minutes of the Court. See § 195.

40. Introducing evidence in a statement.

41. The statement should contain a clear specification of the particular grounds relied on by the appellant, and then so much of the evidence, rulings of the Court, instructions, etc., as may be necessary to explain the points relied on. *Hutton v. Reed et als.*, 25 Cal. 483.

42. Evidence not bearing on the points specified in the statement should be excluded. *Harper v. Minor*, 27 Cal. 107.

43. If the appellant insists that the verdict is not supported by the evidence, the statement should state in what particulars it is insufficient, and contain all the evidence on the point or points relied on, and no more. *Harper v. Minor*, 27 Cal. 107. A statement on motion for new trial, or a bill of exceptions, should contain only so much of the evidence, or a reference thereto, as may be necessary to explain the grounds specifically set forth as causes for new trial. *McMinn v. Whelan*, 27 Cal. 319.

44. Judges or courts, in setting statements, should see that the above rule is complied with. *Id.*

45. Instruments are sometimes admissible for one purpose and inadmissible for another; and when objected to, the grounds of the objection should be stated; and in preparing the record for appeal, so much of the evidence should be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken, otherwise they cannot be regarded. *Proust v. Piper et al.*, 9 Cal. 552.

46. Specification of grounds of error.—A specification of the particular grounds of error is the essential element of a statement; the evidence is the mere incident. *Hutton v. Reed*, 25 Cal. 483.

47. Form of assigning errors.—May be stated as follows: that the respondents are not parties in interest and entitled to bring the suit, having previously divested themselves of their right of property in question; that the suit is barred by a former adjudication between the same parties upon the same subject matter; that the property in question was the separate property of the wife; that the cause of action is barred by the Statute of Limitations. *Barrett v. Tewksbury*, 15 Cal. 359.

48. A specification that the evidence did not justify or warrant the judgment is insufficient. *People v. Parrott*, Jan. T. 1868.

49. A specification of errors, made in the language of section one hundred and ninety-three, is insufficient. *Hutton v. Reed*, 25 Cal. 490.

50. If there is only one question of error that could be raised on the record, this does not excuse the necessity of specifying it. *Zenith Gold and Silver Mining Co. v. Irvine*, 32 Cal. 302.

51. The appellate Court will not entertain an objection, however well founded, unless it is specified as an error in the statement. *Crowther v. Rowlandson*, 27 Cal. 385; *Moore v. Murdock*, 26 Cal. 524.

52. If the statement on motion for a new trial does not specify the particulars in which the evidence is alleged to be insufficient, the appellate Court will assume the facts admitted in the pleadings as well as those found. *Low v. Sierra Nevada Lake Water and Mining Co.*, 32 Cal. 639.

53. There may be some cases of equitable relief where the general ground of appeal will be that the decree is not warranted by the evidence; still, in the majority of cases this general ground will be subject to more particular specification; or that the evidence does not establish a contract, or show a tender, or compliance with particular conditions, precedent, or the like, which will constitute the matters urged upon the Court. *Barrett v. Tewksbury*, 15 Cal. 358.

54. Specifications, where findings are not sustained by the evidence.

55. If a new trial is applied for on the ground that the findings of facts are against the evidence, the moving party should specify in his statement each particular finding of fact which, in his opinion, is against the evidence, instead of stating in general terms that an alleged finding, which is the result of several facts found separately, is against the evidence, otherwise it will not be considered. *Le Roy v. Rogers*, 30 Cal. 229; *Fitch v. Bunck*, 3 Id. 208.

56. **Specifications omitted, appeal will be dismissed or order affirmed.**—When the appeal is from an order denying a new trial, and the statement does not contain the specific grounds of error relied on, the order will be affirmed, or, on motion, the appeal will be dismissed. *Hutton v. Reed et al.*, 25 Cal. 483; *Watts v. Preston*, 25 Id. 61.

58. **Time within which statement must be filed.**—The statement must be filed within five days after the notice of the motion is served on the opposite party; or, if the time for giving notice of motion for a new trial is extended by the Court, the party to whom the extension is given has five days from the time notice is given within which to file his statement as an absolute right, and the Court has power to extend the time twenty days further. *Harper v. Minor*, 27 Cal. 108.

59. If the order denying a motion for a new trial states that the motion was submitted upon the statement and affidavits, by consent of the respective attorneys the respondent is precluded in the appellate Court from saying, that the statement was not filed in time, or that the notice of intention to move for a new trial was not filed or served. *Millard v. Hathaway et al.*, 27 Cal. 119.

60. Where the statement on motion for a new trial is not filed within the time prescribed by law, this Court will only look to the judgment roll. *Lafferty v. Browder*, 11 Cal. 132.

61. **Order extending time to file a statement.**—An order of Court granting a party twenty days within which to file a statement to be used on a motion for a new trial, made before a notice of intention to move for a new trial has been given, must be construed as extending the time to file the statement twenty days from the date of the order, and not twenty days from the time the notice is given. *Easterby v. Larco*, 24 Cal. 179; and,

62. An order of Court allowing a party twenty days within which to file a statement on motion for new trial, must be construed as giving twenty days from the date of the order, and not twenty days beyond the time allowed by statute. *Jenkins v. Frink et al.*, 27 Cal. 337.

63. The Court has no power to extend the time more than twenty days beyond the expiration of the five days' notice. *Harper v. Minor*, 27 Cal. 114.

Construction of the order.—See Rule No. XXIX, for San Francisco.

64. **Void orders, after time has expired.**—An order made by the Court, after the time fixed by the one hundred and ninety-fifth section of the Practice Act, for filing a statement on motion for a new trial, has expired, extending the time to file a statement, is void. *Bear River & A. W. & M. Co. v. Boles et al.*, 24 Cal. 354.

65. If the statement on appeal from a judgment is not served on the respondent's attorney until more than twenty days after the rendition of the judgment, and no extension of time is obtained, a statement is waived, and the appellate Court cannot review any alleged errors, except such as appear in the judgment roll. *Kavanagh v. Maus*, 28 Cal. 261.

66. **Waiver of failure to file statement and serve notice in time, when and when not.**—If the order denying a motion for a new trial states that the motion was submitted upon the statement and affidavit by consent of the respective attorneys, the respondent is precluded in the appellate Court from saying that the statement was not filed in time, or that the notice of intention to move for a new trial was not filed or served. *Millard v. Hathaway et al.*, 27 Cal. 137.

67. The following is a copy of the order of the Court in denying the application for a new trial: "Now, on this day, in open Court, comes on to be heard defendants' motion for a new trial, and thereupon, after having heard the arguments of counsel, the Court overrules the same, to which ruling of the Court defendants, by counsel, except." *Held*, that the order did not show an appearance of the counsel of the plaintiff at the argument of the motion, and, therefore, did not show a waiver of the objection to the filing of the statement. *Kinch v. Williamson et al.*, 24 Cal. 169.

68. A stipulation to refer the whole matter is a waiver of any objection that the motion for a new trial and to set aside the award was not made in statute time. *Heslep v. City of San Francisco*, 4 Cal. 2. See ante, No. 10.

69. The party who claims the benefit of a waiver of the failure to file a statement in due time, must prove it beyond doubt, and not leave it to be ascertained by conjecture or doubtful inference. *Munch v. Williamson et al.*, 24 Cal. 169.

70. If the order denying a motion for a new trial states that the motion was submitted upon the statement and affidavit by consent of the respective attorneys, the respondent is precluded in the appellate Court from saying that the statement was not filed in time, or that the notice of intention to move for a new trial was not filed or served. *Millard v. Hathaway et al.*, 27 Cal. 137.

71. [Service of Statement for San Francisco county, see District Court Rules, No. XXVIII.]

72. Time within which to file amendments.—The time within which proposed amendments to a statement on motion for a new trial are to be made and filed, is left for the regulation of the Court. *Vilhac v. Biven*, 28 Cal. 409.

73. Five days is a reasonable time. *Warden v. Mendocino County*, 32 Cal. 655.

74. Amendments to statement.—A defendant in a motion for a new trial may file amendments to the statement, without waiving his right to object that the notice or statement was not filed or served in time, by a preface that he does so without prejudice to his right to object at the hearing to the notice or statement on these grounds. *Quivey v. Gumbert*, 32 Cal. 304.

75. Amendments, service of.—The statute makes no provisions for the service of amendments to a statement or a copy thereof upon the adverse party, and if notice is given of the time and place of the settlement of a statement before the Judge engrossed statement as settled, will not be stricken because the amendments were not served on the opposite party. *Vilhac v. Biven*, 28 Cal. 409. Otherwise, by Rule XXVIII, in the City and County of San Francisco.

76. Notice of settlement.—If the notice of the time and place of the settlement of a statement before a Judge on motion for a new trial is given to the appellant, and he does not attend, he cannot afterwards complain of the statement as settled. *Vilhac v. Biven*, 28 Cal. 409. See Rule XXVIII, for San Francisco county.

77. Statement, settlement and authentication of.—A statement which was filed in the Court below on motion for a new trial, and is neither agreed to by counsel, nor settled by the Judge trying the case, has not sufficient authentication to constitute any portion of the record which this Court can notice. *Doyle v. Seawall*, 12 Cal. 425; *Paige v. O'Neal*, 12 Id. 492.

78. The certificate of a Judge is a sufficient authentication of a statement; and where a party does not think proper to file amendments, or the Judge to correct the statement, the certificate of that fact by the Judge is all that is necessary. *Redman v. Guinac*, 5 Cal. 148.

79. If the statement filed in support of a motion for a new trial is not settled by the Judge, it cannot be therefore inferred that it was agreed to. Such statement must either be agreed to, or it must be settled by the Judge, and one of these conditions must be shown affirmatively. In the absence of both, such statement will be rejected. *Stim v. Trist*, 3 Cal. 89.

80. It is no objection that the statement does not affirmatively show that the settlement was upon proper notice, or in the presence of both parties. In the absence of evidence to the contrary, the presumption of law is in favor of the regularity of all official acts. *Battersby v. Abbott*, 9 Cal. 568.

81. A refusal to allow an amendment is presumed to be right, unless the character of the proposed amendment is shown in the record. *Jessup v. King*, 4 Cal. 334.

82. A statement on motion for a new trial will not be regarded unless it is agreed to by the attorneys of the respective parties or settled and authenticated by the Court. *Coe Grove v. Johnson*, 30 Cal. 509; *Vilhac v. Biven*, 28 Id. 409.

83. A motion by the moving party to strike out the other party's proposed amendments to his statement on a motion for a new trial, and denial thereof by the Court, is not a settlement and authentication of the statement by the Court. *Id.*

84. Where the statement is filed and served by the moving party, on motion for a new trial, and amendments thereto are made by the opposing party, and the only settlement of or certificate to the same was an indorsement by the Judge at the bottom of the settlement, that the amendments to the statements were allowed: *Held*, that the statement would not be considered on appeal. *Baldwin v. Ferris*, 23 Cal. 461.

Authentication of statement.—See further, *post*, § 341, and notes.

85. Practice where a party is dissatisfied with the settlement.—If the appellant was not satisfied with the action of the Court below in settling the statement on motion for a new trial, and desired to correct the same in this Court, as provided in section one hundred and eighty-nine of the Practice Act, he should have presented a petition for that purpose before the final submission of the case. He cannot be allowed to incorporate in his transcript *ex parte* affidavits impeaching the statement, and after the final submission of the case, brings the question before us for the first time in his brief. *Wor-mouth v. Gardner*, April T. 1868. [Remedy in the Supreme Court.] A motion to correct a statement or exceptions, where the Court below refuses to make the same conform to the facts, is an original proceeding in this Court, and must be instituted by a petition in writing, setting forth at length the exceptions which were taken at the trial and not allowed by the Judge, and so much of the evidence as may be necessary to illustrate them. The petition should be presented with the record, and the application made before the case is submitted. *Id.*

86. Settlement by stipulation.—If the attorneys for appellant and respondent stipulate in writing that the statement contained in the record is a correct statement on motion for a new trial, and that the judgment roll, orders and instructions, given and refused by the Court, the statement and stipulation constitute a true and correct statement on appeal to the Supreme Court, and may be used as such without further certificate or identification; all technical objections to the transcripts are waived, and it will be presumed that a motion for a new trial was regularly given, although none appear in the record. *Godchaux v. Mulford*, 26 Cal. 318.

87. If the parties agree to a statement of facts, and stipulate that it may be used by either party in any and all proceedings in the action, the statement of facts become a part of the judgment roll. *Burnett v. Pacheco*, 27 Cal. 409.

88. [The judge, within twelve months after the expiration of his office, may sign and settle statements on motions for new trials, and statements and bills of exceptions on appeal. Laws of 1859, page 220. "Section 3. This act shall not be deemed to take from the successors of any District Judge the power to sign any record, or to sign or settle any statement or bill of exceptions, as heretofore authorized by law." *Id.*]

89. San Francisco.—Statements on motion for a new trial shall be settled by the Judge or referee, before whom the cause was respectively tried. Rule No. XXII of the District Courts.

90. Engrossment of statement, authentication to be endorsed thereon.—Where there are amendments to a proposed statement on appeal, the draft proposed and the amendments allowed should be incorporated into one document, as in their separate form they cannot be regarded as any part of the record. *People v. Edwards*, 9 Cal. 286; *Skilman v. Riley*, 10 *Id.* 300.

91. Where amendments are made to a statement on appeal, a fair copy of the statement so amended should be made. Otherwise, the Supreme Court will not look into it. *Marlow v. Marsh*, 9 Cal. 259.

92. The proper practice is to engross the statement as settled, including so much of the deeds and other documentary evidence pertaining to the case as is directed to be inserted, and have the authentication of the Judge or attorneys indorsed on the engrossed statement. *Kimball v. Semple*, 31 Cal. 657.

93. A statement ought always to be engrossed where any amendments are allowed, or where documentary evidence is directed to be inserted, especially when such documents constitute no part of the files or records of the Court. *Id.* [Statement must be engrossed within ten days. See Rule XXVIII for San Francisco county.]

94. Decisions as to a waiver of authentication.—Where a party appears and argues a motion for a new trial, he cannot afterwards object that the statement was not agreed to by him, and that it was not settled by the Judge. *Dickinson v. Van Horn*, 9 Cal. 207.

95. When it appears from the bill of exceptions, signed by the Judges, that the motion for new trial was heard on statement, counter statement and affidavits, it cannot be objected that the statement was not settled. *Williams v. Gregory*, 9 Cal. 76.

96. A statement on motion for new trial, signed by the Judge, and appearing, from the minutes of the Court, to have been used on the hearing of the motion, is sufficiently authenticated. The statute points out no mode of authentication, and any satisfactory evidence in the record, in some legitimate and proper form, that the statement has been examined and approved by the Judge, is sufficient. *Kidd v. Laird*, 15 Cal. 161. See post, No. 99.

97. The Courts should look at the substance of the contents of the statement, and disregard its imperfections in form. *Ritggold v. Haven*, 1 Cal. 113.

98. By agreeing to submit a motion for a new trial without the statement having been settled or authenticated, the party resisting a new trial does not waive his right to object to the want of a properly authenticated statement. *Cosgrove v. Johnson*, 30 Cal. 509.

99. A statement on motion for a new trial, which is not certified as correct by the parties or by the Judge, will not be regarded in the appellate Court. *Vilhac v. Biven*, 28 Cal. 409; *Cosgrove v. Johnson*, 30 Id. 509.

100. Presumption that statement contains all the evidence.—It is presumed that the statement on motion for new trial contains all the evidence pertinent to the motion. *Smith v. Athearn*, Jan. T. 1868.

101. If the statement on motion for a new trial specifies certain particulars, in relation to which it is claimed a finding of fact is unsupported, the presumption will be that all the evidence upon the point specified is contained in the statement, although the record does not show affirmatively that such was the case. (*Owen v. Morton*, 24 Cal. 375, as to this point, overruled.) *Hidden v. Jordan*, 28 Cal. 301.

102. Where the statement on appeal does not purport to contain all the evidence, the appellate Court will not consider an objection that the verdict is not sustained by the evidence. *Moore v. Tice*, 22 Cal. 513.

103. A statement cannot be waived.—Where the attorneys of both parties appear in open Court, and by consent argue a motion for a new trial, this consent, even if it is a waiver of a notice of intention to move for a new trial, is not a waiver of a statement in some proper form of the grounds of the motion. *Id.* *Walls v. Preston*, 25 Cal. 61.

104. Waiver of right to move for a new trial.—A party failing to give notice in time of his intention to move for a new trial, or to file his statement in time, waives his right to move for a new trial. *Caney v. Silverthorne*, 9 Cal. 67.

105. A failure to file a statement, setting forth the grounds upon which a party intends to rely, on motion for a new trial, operates as a waiver of the right to the motion. *Wing v. Owen*, 9 Cal. 247.

106. If the statement on application for a new trial is filed more than five days after the filing and service of the notice, the right to move for a new trial is waived, unless it appear from the transcript that the objection to the failure to file the statement in season has been waived by the opposite party, either expressly or by implication. *Munch v. Williamson et al.*, 24 Cal. 169.

107. If a statement on motion for a new trial is not filed within five days after notice of intention to move for a new trial is given, or within such further time as may be granted by the Court, not exceeding twenty days, the right

to move for a new trial is waived. *Easterby v. Larco*, 24 Cal. 179; *Jenkins v. Wink*, 27 Cal. 337; *Le Roy v. Rasette*, 32 Cal. 171.

108. If a statement prepared on motion for a new trial is not filed within the time prescribed by the one hundred and ninety-fifth section of the Practice Act, the right to move for a new trial is waived; and where such right is thus waived, the Court has no power to restore it. *Hegeler v. Henckell*, 27 Cal. 491.

109. If the statement on motion for a new trial is not filed in time, an order granting a new trial for causes appearing in such statement only will be reversed by the appellate Court. *Id.*

110. Amendments after settlement.—A statement on motion for a new trial, regularly settled and signed by the Judge, and containing all the grounds of the motion, but without any specification thereof, may be amended by the Judge so as to insert a specification of the grounds of the motion, after the time for filing a statement has passed. *Valentine v. Stewart*, 15 Cal. 387. *Valentine v. Stewart*, 15 Cal. 396, that the Court below may allow an amendment to a statement on a motion for a new trial, by adding the grounds of the motion after the time for filing a statement has passed, affirmed by *Loucks v. Edmondson*, 18 Cal. 203.

111. On motion for new trial the Court below should not, unless good reason be shown, receive an affidavit made, after the time for filing affidavits or statements on the motion has elapsed. *Hove v. Briggs*, 17 Cal. 385.

112. If a deed is mentioned in a statement on motion for a new trial, as having been in evidence, but is not presented in the statement, the appellant may make it a part of the record on appeal by printing it in the transcript, with a certificate of the Judge that it is the deed referred to in the evidence, and that it was before him on motion for a new trial.—*Hess v. Winder*, 30 Cal. 349.

113. When the specification in the statement is that the judgment is contrary to the evidence, it has been regarded as a clerical error, and that verdict instead of judgment was intended. *Wendt v. Ross*, Oct. T. 1867.

114. A statement agreed on by parties should not probably be amended by the Court on motion, unless under a very clear showing of mistake or fraud. *Hutchinson v. Bours*, 13 Cal. 52.

115. The Court refused to remand the cause for the purpose of amending the bill; but the Court declined to decide that a new bill, with proper amendments, could not be filed. *Mulford v. Cohn*, 18 Cal. 42.

116. The Court should not entertain a motion to amend the statement after it has been filed and served on the opposite party. *Levy v. Getteson*, 27 Cal. 666. See post, § 338, "Amendment of Statement."

117. Statement cannot be stricken out.—The Court should not strike out a notice or statement on motion for a new trial, under any circumstances. The motion should be denied, that the action of the Court may be reviewed on appeal. *Quivey v. Gambert*, 32 Cal. 304.

118. If there are any technical grounds upon which a motion for a new trial may be resisted, such a failure to file and serve notice of motion, or to file statement in time, the proper practice is to raise such grounds on the argument of the motion as a reason why the motion should be denied. *Id.*

119. An order striking out a statement on motion for a new trial, cannot be brought before the Supreme Court for review by a bill of exceptions. *Id.*

120. But an unauthenticated document, purporting to be a statement on motion for a new trial, will be stricken from the transcript on appeal. *Id.*

[121. See further, § 338, as to manner of preparing statements; also, §§ 193, 245, as to the remedial powers of the Supreme Court, and decisions on appeal from orders granting and denying motions for a new trial, and other orders and decisions.]

122. See further authorities under the following sub-heads to § 193:

123. General rule, that a new trial will not be granted where there is a substantial conflict of evidence; § 193, No. 102.

124. This rule applies to law and equity cases alike, No. 103.

125. It does not apply where the evidence consists of depositions, No. 104.
126. It does apply to reports of commissioners, No. 105.
127. It applies to findings by referees, No. 106.
128. Referees' reports and awards, when they will be disturbed, see § 187, note 12.
129. Supreme court will not weigh, but will review the evidence, when, No. 112.
130. Facts will not be reviewed unless a new trial was asked, No. 114.
131. When the supreme court will and will not set aside a judgment, verdict, finding or order, as considering the evidence, No. 118.
132. The presumption of law is, that the evidence warranted the verdict, No. 120.
133. Special cases of immaterial errors, in admitting or excluding evidence, No. 139.
134. Giving a wrong reason for a decision, No. 153.
135. Granting new trial for immaterial errors, note, No. 157.
136. Special cases, when new trials were granted, judgments modified, etc., No. 165.
137. New trial in equity cases, No. 170.
138. When equity will and will not interfere, No. 175.
139. Dismissal of a motion amounts to a denial, No. 179.
140. When an appeal from an order will be dismissed, No. 180.
141. A new trial granted for alleged errors of law will be reviewed, No. 182.
142. Illegal evidence presumed injurious, No. 183.
143. Errors occurring at the trial must be specially excepted to at the time, No. 184.
144. The party must lay his finger on the point of his objection, No. 197.
145. Granting or refusing a new trial, discretionary, No. 198.
146. A new trial will be granted when justice requires it, No. 203.
147. On a motion for a new trial the Court cannot reverse a former judgment, No. 213.
148. Effect of a stipulation that a motion for a new trial be denied, No. 229.
149. Where an attorney appears without authority, No. 230.
150. Affidavits in a foreign language may be excluded, No. 231.
151. Law of the case, No. 232.
152. County court may grant a new trial, No. 233.

§ 196. *¹Motion to be made without delay.*

The application for a new trial shall be made at the earliest period practicable after filing the affidavit or statement, and the Court or Judge granting or refusing a new trial shall state in writing the grounds upon which the same is granted or refused.

¹Amended 1863, 361.

1. The fact that instructions given by the Court are lost or mislaid before a motion for new trial is heard, is no ground to suspend the hearing of the motion or for a new trial. *Visher v. Webster*, 13 Cal. 58.

2. The Judge below is presumed to know what instructions he gave the jury, and if those written are out of the way, he may resort to other evidence or his own memory. *Id.*

3. A failure to prosecute a motion for a new trial when it comes up for argument, operates as an abandonment of the motion, and the order made denying the motion, for such failure to appear, is not the subject of review on appeal. *Frank v. Doane*, and *Green v. Doane*, 15 Cal. 302.

4. If a motion for a new trial is not prosecuted with due diligence, it should be dismissed on the application of the opposite party. *Eckstein v. Calderwood*, 27 Cal. 413.

5. If the Judge who tried a cause goes to a county in his district not adjoining the one in which the case was tried to hold Court, before the time for filing amendments to the statement on motion for a new trial has expired, the moving party prosecutes the motion with due diligence if he brings the same to a hearing when the Judge returns or first holds Court in a county adjoining the one in which the case was tried. *Warden v. Mendocino County*, 32 Cal. 655.

TITLE XX.

CHAPTER VIII.—*The manner of giving and entering judgment.*

SECTION 197. Judgment to be entered in twenty-four hours, etc.

198. Case may be brought before the Court for argument.

199. When counter claim established exceeds plaintiff's demand.

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207. Transcript to be filed in any county, and judgment to become a lien there.

208. Satisfaction of a judgment, how made.

§ 197. *Judgment to be entered in twenty-four hours, etc.*

When trial by jury has been had, judgment shall be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the Court order the case to be reserved for argument, or further consideration, or grant a stay of proceedings.

§ 198. ¹*Case may be brought before the Court for argument.*

When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the Court for argument.

¹Amended 1854, 88.

§ 199. *When counter claim established exceeds plaintiff's demand.*

If a counter claim, established at the trial, exceed the plaintiff's demand, so established, judgment for the defendant shall be given for the excess ; or if it appear that the defendant is entitled to any other affirmative relief, judgment shall be given accordingly.

N. Y. Code, § 263.

§ 200. *¹In replevin, judgment to be in the alternative, and with damages ; gold coin or currency judgment.*

In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein ; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff, whether the same be by default, or after verdict, may be made payable in the same kind of money or currency so received by such person.

¹Amended 1863, 687.

1. **Replevin, damages.**—In an action of replevin in the detinue, the value which the plaintiff is entitled to recover under section 200 of the Practice Act, in case a return of the property cannot be had, is the value of the property to be ascertained at the place where it is detained when the action is commenced. The defendants are not entitled to claim compensation for money or services laid out or expended upon the plaintiff's property in the absence of a request on his part. No request will be presumed when the property of one person is taken under legal process issued. *Hisler v. Carr*, Jan. T. 1868.

2. The damages, when the property has been delivered, is the legal interest on the value thereof during the detention. *Nickerson v. Chatterton*, 7 Cal. 568; *Douglass v. Craft*, 9 Id. 662.

3. See further *ante*, § 99, note No. 33.

4. Value in legal tender notes.—In an action to recover possession of personal property, the plaintiff may recover its value in United States legal tender notes. *Turpey v. Shepherd*, 30 Cal. 180.

5. One unlawfully converting property does not sustain any injury if the property in an action to recover possession of the same find its value in United States legal tender notes. *Id.*

6. Gold coin judgments.—If to a note, secured by a mortgage duly recorded, payable in money, generally a supplement is afterwards added agreeing

16. If a promissory note has the words "in gold coin" and the words "value received," but does not contain the words "in gold coin" in the promise to pay, judgment should not be rendered payable in gold coin, although there is in the instrument a subsequent promise to pay the difference between the value of gold coin and paper currency of United States, if not paid in gold coin. *Lamping v. Hyatt*, 27 Cal. 102.

17. In an action against the sureties upon a bond given by the general

§ 199. *When counter claim established exceeds plaintiff's demand.*

If a counter claim, established at the trial, exceed the plaintiff's demand, so established, judgment for the defendant shall be given for the excess ; or if it appear that the defendant is

An Act to amend an Act entitled " An Act to regulate proceedings in civil cases in Courts of Justice in this State," passed April 29th, 1851. The People of the State of California, represented in Senate and Assembly, do enact as follows :

Section 1.—Section 200 of said Act is amended so as to read as follows :

§ 200. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the sum be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein ; and in all actions for the recovery of money, if the plaintiff shall allege in his complaint that the same was understood and agreed by the respective parties, to be payable in a specified kind of money or currency, and the same shall be admitted by the default of the defendant or

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established by evidence, to the satisfaction of the Court, Referee or Jury by whom the action shall be tried, the judgment for the plaintiff shall be made payable in the kind of money or currency so specified in the complaint, and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff, whether the same be by default or after verdict, may be made payable in the same kind of money or currency so received by such person.

Sec. 2.—All provisions of any Act conflicting herewith are hereby repealed.

Sec. 3.—This Act shall take effect immediately.

[Approved March 12th, 1870.]

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laid out or expensed upon the plaintiff's property in the absence of a request on his part. No request will be presumed when the property of one person is taken under legal process issued. *Hiesler v. Carr*, Jan. T. 1868.

2. The damages, when the property has been delivered, is the legal interest on the value thereof during the detention. *Nickerson v. Chatterton*, 7 Cal. 568; *Douglass v. Craft*, 9 Id. 562.

3. See further *ante*, § 99, note No. 33.

4. **Value in legal tender notes.**—In an action to recover possession of personal property, the plaintiff may recover its value in United States legal tender notes. *Turpey v. Shepherd*, 30 Cal. 180.

5. **One unlawfully converting property does not sustain any injury if the jury in an action to recover possession of the same find its value in United States legal tender notes.** *Id.*

6. **Gold coin judgments.**—If to a note, secured by a mortgage duly recorded, payable in money, generally a supplement is afterwards added agreeing to pay in gold coin, which supplement is not recorded, the mortgage can be enforced by a sale for gold coin, as against subsequent encumbrancers whose lien attached after the addition to the note. *Poett v. Stearns*, 31 Cal. 78.

7. **As a matter of law there is no possible difference in value between gold coin and legal tender notes, nor can evidence be received to prove a difference.** *Id.*

8. **Where the kind of money received by the defendant is not in issue, and he has received the same in a fiduciary capacity, or to the use of another, it is proper for the Court, upon a verdict for the amount of money, to order judgment in the kind of money received by him.** *Pinkerton v. Woodward*, Oct. T., 1867.

9. **Upon an accounting, a promise in writing by the defendant to pay the sum found due in gold coin, justifies a judgment in gold coin.** *Dodge v. The Mariposa Co.*, Oct. T. 1867.

10. **In an action for money had and received where an account is introduced in evidence by the defendant, showing a charge by the defendant against the purchasers of plaintiffs claim of "cash" paid to the plaintiff, and the only cash mentioned in the testimony is gold coin, the jury may find a verdict for plaintiff in gold coin.** *Wendt v. Ross*, Oct. T. 1867.

11. **There it is found by the Court in an action brought to redeem, "that it was tacitly understood by and between the plaintiff and wife and the defendant, that the conveyance made by plaintiff to defendant was intended to secure the repayment to said defendant of the sums paid and advanced by him, with interest thereon, and not as an absolute conveyance of the premises, and that upon such payment in gold coin of the United States said defendant would reconvey said premises to the plaintiff or the plaintiff's wife." The judgment must require the plaintiff to pay the redemption money in gold coin, not under the provisions of the Specific Contract Act, but upon the principle that "he who seeks equity must do equity."** *Coving v. Rogers*, Jan. T. 1868.

12. **Costs and interest in gold coin.**—Where a contract is made payable in a specific kind of money, the judgment enforcing it may enforce the payment of costs and interest in the kind of money mentioned in the contract. *Carpentier v. Atherton*, 25 Cal. 569.

13. **It is error for the Court to adjudge the costs in an action for forcible entry and detainer to be paid in gold coin.** *Moore v. Del Valle*, 28 Cal. 170.

14. **Gold and silver coin.**—Where a note is made payable "in gold and silver coin," it is error to render judgment for gold coin alone. *Burnett v. Stearns*, Oct. T. 1867.

15. **Gold coin judgment not permitted, where.**—Where suit is brought on a general indebtedness without a written contract to pay, or on a written contract to pay money generally, without designating the kind of money, the Court cannot render a judgment payable in a specific kind of money. *Cuvas v. Abadie et al.*, 25 Cal. 502.

16. **If a promissory note has the words "in gold coin" after the words "value received," but does not contain the words "in gold coin" in the promise to pay, judgment should not be rendered payable in gold coin, although there is in the instrument a subsequent promise to pay the difference between the value of gold coin and paper currency of United States, if not paid in gold coin.** *Lamping v. Hyatt*, 27 Cal. 102.

17. **In an action against the sureties upon a bond given by the general**

guardian of an infant minor, but not made payable in any specific kind of money, a judgment should not be rendered payable in gold coin. *Fox v. Minor*, 32 Cal. 111; *Mendocino Co. v. Morris*, Id. 149.

18. In an action against the principal and his sureties, on an official bond, if the bond contains no promise to pay in coin, judgment can only be rendered in money generally. This rule applies to the principal as well as sureties. *Mendocino County v. Morris*, 32 Cal. 145.

19. Where the jury, without particular instruction from the Court, return a verdict payable in gold coin, though there was no evidence that either on or after striking a balance between the parties the defendant promised in writing to pay in gold coin, a new trial will be granted. *Howard v. Roeben*, Oct. T. 1867.

20. **Gold coin or its equivalent.**—A contract to pay money in gold coin of the United States, or the equivalent of such gold coin, if paid in legal currency, is a contract to pay the given number of dollars in any kind of lawful money of the United States, and cannot be conferred in any specific kind of money. *Reese v. Stearnes*, 29 Cal. 273.

21. The Specific Contract Act does not authorize the entry of an alternative judgment upon such contract, payable in gold coin or its equivalent in legal tender notes. *Id.*

22. **Services, value in legal tender notes.**—In an action for the value of services rendered, when no price has been agreed upon by the parties, if the jury adopt treasury notes, made by Act of Congress a legal tender in payment of debts, as the standard of value, the verdict will not be set aside on that ground. *Spencer et al. v. Prindle*, 28 Cal. 276.

23. **Rents.**—Where the annual value of premises is found both in gold and in currency, the judgment may be general for the amount of the currency valuation. *Carpentier v. Small*, Oct. T. 1866.

24. **Tender, plea of.**—If, by the laws of the United States, there is more than one kind of lawful money a legal tender in payment of debts, and the plaintiff in an action is entitled to a judgment payable in a particular kind of money, a plea of tender which avers the tender to have been made in lawful money of the United States is insufficient. The plea should aver that the tender was made in the kind of money the plaintiff is entitled to receive. *Magraw v. McGlynn*, 26 Cal. 428.

25. **Construction of section 200.**—The two hundredth section of the Practice Act, as amended in 1863, making provision for the entry of judgments in certain cases payable in a specific kind of money, confers a special authority on Courts not known to the common law, or Courts of equity, and must be strictly construed. *Hathaway v. Brady*, 26 Cal. 566.

26. **Judgments in a specific kind of money or currency.**—See *ant.*, § 147, notes; § 150, note No. 21.

§ 201. Judgment book to be kept by the clerk.

The Clerk shall keep among the records of the Court, a book for the entry of judgments, to be called the "Judgment Book," in which such judgment shall be entered, and shall specify clearly the relief granted, or other determination of the action.

N. Y. Code, § 280.

§ 202. *If a party die after verdict, judgment may be entered, but not to be a lien.*

If a party die after a verdict or decision upon any issue of fact, and before judgment, the Court may nevertheless render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be payable in the course of administration on his estate.

1. The continuance of the name of a deceased plaintiff instead of that of his executor in a judgment rendered after the substitution, is an error of form only, and does not make the judgment void. *Gregory v. Haynes*, 21 Cal. 443.

2. Where the plaintiff in an action died before trial, and a subsequent order for judgment contained a recital as follows: "This action having been continued in consequence of the death of the plaintiff, by his executor, Samuel Webb, and the jury having found a verdict for plaintiff," and then awarded judgment in favor of the plaintiff: *Held*, that the recital sufficiently showed a suggestion of the death of the original plaintiff, and a continuance or revival of the cause, in the name of the executor. *Id.*

3. The death of an appellant, after argument of his case on appeal, does not constitute any ground for delaying a decision, or a departing from the ordinary course of procedure, except as to the entry of the judgment which may be rendered. The entry should be of a day anterior to the appellant's death. *Black v. Shaw*, 20 Cal. 68.

4. The rule is different if the death occurs previous to the argument. In that event further proceedings can only be had upon leave given after suggestion of the death is made. *Id.*

5. It is irregular to enter judgment against a defendant, on whose behalf a demurrer is on file, without disposing of the demurrer, and a judgment so entered will be reversed on appeal. *Hestres, administrator, v. Clements*, 21 Cal. 425.

§ 203: Judgment roll, what to constitute.

Immediately after entering the judgment, the clerk shall attach together and file the following papers, which shall constitute the judgment roll:

First—In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum endorsed upon the complaint that the default of the defendant in not answering was entered, and a copy of the judgment.

Second—In all other cases, the summons, pleadings, verdict of the jury, or finding of the Court, commissioner, or referee, all bills of exceptions taken and filed in said action, copies of orders sustaining or overruling demurrers, a copy of the judgment, and copies of any orders relating to a change of parties.

¹Amended 1862, 119; 1866, 846; N. Y. Code, § 281.

1. A judgment does not depend upon the clerk performing his duty in making the judgment roll, or in preserving the papers. If the facts necessary to give jurisdiction to the Court exist, the judgment is good. *Lick v. Stockdale*, 18 Cal. 219.

2. On appeal from a judgment, without a statement, nothing is brought up or is a part of the record on appeal, except the judgment roll, and no question

arising outside of the roll can be considered. If any further record is required, it must be made in the form of a statement. Exceptions may be taken and settled at the trial in the mode prescribed by sections 188, 189 and 190. These under section 203 are annexed to and form a part of the judgment roll, and therefore constitute a part of the record on appeal from the judgment, on the judgment roll alone. They are the only bills of exceptions known to our Practice Act. *Wetherbee v. Davis*, Oct. T., 1867.

3. An answer, notwithstanding an order to strike it out, is still entitled to its place in the judgment roll. *Abbott v. Douglass*, 28 Cal. 295.

4. A bill of exceptions made during the progress of a trial should, under sections one hundred and eighty-eight, one hundred and eighty-nine, and two hundred and three, of the Practice Act, be written down, settled, and signed by the Judge, filed in the case, and afterwards annexed to the judgment roll. *Moore v. Del Valle*, 28 Cal. 170.

5. If the clerk neglects to make up the judgment roll it does not vitiate the judgment nor the proceedings under it. *Sharp v. Lumley*, Jan. T. 1868.

6. Until the amendment to the two hundred and third section of the Practice Act, the judgment roll was not required to contain the order sustaining or overruling a demurrer. *Abadie v. Carrillo*, 32 Cal. 172.

7. If prior to said time a demurrer to the complaint was filed, and a judgment by default was entered, and the appeal rested on the judgment roll, and the same did not disclose what action was taken on the demurrer, the presumption was that the demurrer was disposed of, and that the necessary preliminary steps were taken to obtain judgment. *Id.*

8. In case of a judgment by default, the judgment roll consists of the summons, the affidavit or proof of service, the complaint, with the default indorsed thereon, and a copy of the judgment. For the purpose of determining whether a want of jurisdiction is shown by the record, the Court can only look to the judgment roll. *Hahn v. Kelly*, Oct. T. 1867.

9. Nothing is included in the record of a suit but the judgment roll. Where judgment is taken by default, the judgment roll therein consists of the summons, proof of service, complaint, with memorandum indorsed thereon, that the default of the defendant in not answering was entered, and a copy of the judgment. *Sharp v. Daugney*, Oct. T. 1867.

10. The circumstance that papers not belonging to the judgment roll are found commingled with or attached to other papers that do belong to it, can create no embarrassment. The case is one of mixture, not of fusion. *Id.*

11. An affidavit upon which to base a motion to strike out an answer, and notice of such motion and affidavit of its service, constitute no part of the judgment roll. *Dimick v. Campbell*, 31 Cal. 238.

12. See further, § 346, "Transcript."

§ 204. Judgment lien, when it begins and when it expires.

Immediately after filing a judgment roll the clerk shall make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed, it shall become a lien upon all the real property of the judgment debtor, not exempt from execution in the county owned by him at the time, or which he may afterwards acquire, until the said lien expires. The lien shall continue for two years, unless the judgment be previously satisfied.

1. A conveyance made without authority will not affect the lien of a judgment. *Smith v. Morse*, 2 Cal. 524.

2. The judgment debtor cannot set up errors in docketing the judgment as

destroying its lien, when the property has been sold on execution under the judgment; if the property sold is his, the levy operated as a lien; if not, he has no right to complain. *Low v. Adams*, 6 Cal. 277.

3. **Lien cannot be extended.**—The issuing and levy of an execution before the lien of the judgment upon which the execution issued expires, will not operate to prolong the lien of the judgment beyond the time limited in section two hundred and four of the Code. *Isaac v. Swift*, 10 Cal. 71.

4. It required express words of the statute to create the lien, and it equally requires express words to continue it beyond the time specified. *Id.*

5. The levy and sale must both be made within the period of two years limited by statute. *Id.*

6. An appeal from a judgment suspends the lien, which is merely an incident; and the statutory limitation of the lien commences to run only from the date of the *remittitur* from the appellate Court. *Dewey v. Lalson*, 6 Cal. 130.

7. If an undertaking on appeal to the Supreme Court be insufficient in amount to stay proceedings, the lien of the judgment is not extended by the appeal beyond two years from the time of its docketing; and this, where the undertaking was accepted to, there being no effort to enforce the judgment pending the appeal. *Guy v. Du Uprey*, 16 Cal. 194.

8. **What property is subject to.**—The lien of a judgment is purely the creature of statute; and in this State, the statute only provides that a judgment shall become a lien from the time it is docketed upon the property of the judgment debtor, "not exempt from execution," which means upon property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the Court. *Ackley v. Chamberlain*, 16 Cal. 181.

9. The statutory lien of a judgment upon the real estate of the judgment debtor attaches only upon property in which such debtor has a vested legal interest. *People v. Irwin*, 14 Cal. 428.

10. A judgment recovered against the husband does not become a lien on the homestead, and a sale of the homestead upon an execution issued on such judgment is void. *Ackley v. Chamberlain*, 16 Cal. 181.

11. Where, in a foreclosure suit, the judgment is in the usual form—ascertaining the amount due, directing a sale of the mortgaged premises, application of the proceeds to the payment of the debts, providing for the recovery of any deficiency, and authorizing execution for the same—such judgment does not become a lien on the real estate of the debtor from the time it is docketed. *Chapin v. Broder*, 16 Cal. 403.

12. **Query:** Whether a leasehold estate for a term of years is property in such sense that a judgment docketed becomes a lien thereon. *McDermott v. Burke*, 16 Cal. 580.

13. In this State a judgment cannot become a lien upon the homestead. It can become a lien only upon the real property of the judgment debtor. *Bowman v. Norton*, 16 Cal. 213.

14. A judgment obtained and docketed in the Superior Court of the city of San Francisco, became a lien upon the real property of the judgment debtor, not exempt from execution, within the county of San Francisco. *Bowman v. Hocius*, 17 Cal. 471.

15. **What does, or does not release a lien.**—The payment by a judgment debtor of the judgment, after a sheriff's sale, extinguishes the lien; and the fact that he takes a transfer of the certificate and the sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. *McCarty v. Christie*, 13 Cal. 79.

16. The perfecting an appeal does not release the lien acquired by docketing the judgment. *Low v. Adams*, 6 Cal. 277.

17. The act of April, 1856, creating San Mateo county out of a portion of the territory of the county of San Francisco, did not destroy or affect judgment liens then existing; but such liens continued upon the land of the judgment debtor, not exempt from execution, until the expiration of the statutory period, without recording the judgment in the county of San Mateo, where the lands lie. And recording the judgment in this latter county, after the

lien was exhausted by the expiration of the two years from the time of its docketing in the Superior Court, will not revive the lien. *Bourman v. Hovious*, 17 Cal. 471.

18. When the lien begins to run, and when it expires.—The two years during which a judgment remains a lien on real estate commence to run from the docketing of the judgment, unless the judgment is stayed by an order of the Court pending a motion for new trial, or a stay bound on appeal. *Barroilhet v. Hathaway*, 31 Cal. 395.

19. The time during which proceedings are stayed by order of the Court or a stay bound on appeal, must be excluded from the computation of the time during which the judgment remains a lien. *Id.*

20. If any time is allowed to elapse between the docketing of the judgment and the stay of proceedings, such time must be included in the computation of the time during which the judgment remains a lien. *Id.*

21. Where an appeal has been taken, and a bond sufficient to stay proceedings upon the judgment pending the appeal has been given, the lien of the judgment upon the real estate of the judgment debtor in the county where the same was docketed, owned by him at the date of the docketing of the judgment or subsequently acquired, until the lien expires, remains a valid and subsisting lien until the end of two years from and after the date of the remittitur from the Supreme Court. *Englund v. Lewis et al.*, 25 Cal. 350.

22. In foreclosure cases, where there is a judgment *in personam*, and also a judgment enforcing a lien and directing a sale of the property, and the undertaking on appeal only stays the sale, and provides for costs, the lien of the personal judgment on the judgment debtor's property in the county where it is docketed, attaches at the time it is docketed, and expires at the end of two years from the time the personal judgment is docketed. *Id.*

23. An appeal from a judgment suspends the lien, which is merely an incident, and the statutory limitation of the lien commences to run only from the date of the remittitur from the appellate Court. *Devey v. Latson*, 6 Cal. 130. [But see *Chapin v. Broder*, 16 Cal. 404, and authorities there cited.]

24. Decree for sale of property not a judgment lien.—In foreclosure cases, if the plaintiff does not obtain a personal judgment against the defendant, but contents himself with a decree enforcing the lien and directing a sale of the property, such decree does not become a judgment lien on the other property of the judgment debtor until after a sale has been had and the deficiency, if there be one, ascertained and docketed, and then only for the amount of such deficiency. *Englund v. Lewis et al.*, 25 Cal. 349.

25. If in an action brought to recover judgment for a debt and to foreclose a mortgage given to secure the same, a judgment *in personam* is rendered for the amount due, and directing a sale of the mortgaged premises and an application of the proceeds to the payment of the judgment, the judgment, even if docketed, does not become a lien upon the real property of the defendant until the mortgaged property has been sold by the sheriff, and the balance, if any, reported by him and docketed by the clerk, and then only for such balance. *Culver v. Rogers*, 28 Cal. 520.

§ 205. Docket, how kept, and what to contain.

The docket mentioned in the last section is a book which the clerk shall keep in his office, with each page divided into eight columns, and headed as follows: judgment debtors; judgment creditors; judgment: time of entry; where entered in judgment book; appeals, when taken; judgment of appellate Court; satisfaction of judgment, when entered. If judgment be for the recovery of money or damages, the

amount shall be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted shall be stated. The names of the defendants shall be entered in the docket in alphabetical order.

1. The docketing of a judgment imparts constructive notice of the lien of the judgment on the real estate of the judgment debtor to strangers to the judgment. *Page v. Rogers*, 31 Cal. 293.

§ 206. *Docket to be open for inspection without charges.*

The docket kept by the Clerk shall be open at all times^a during office hours for the inspection of the public, without charge; and it shall be the duty of the Clerk to arrange the several dockets kept by him in such a manner as to facilitate their inspection.

§ 207. *Transcript to be filed in any county, and judgment to become a lien there.*

A transcript of the original docket certified by the clerk may be filed with the Recorder of any other county, and from the time of the filing the judgment shall become a lien upon all the real property of the judgment debtor not exempt from execution in such county owned by him at the time, or which he may afterwards acquire, until the said lien expires. The lien shall continue for two years, unless the judgment be previously satisfied.

See § 237. N. Y. Code, § 282.

1. Section two hundred and forty-six of the Practice Act authorizes, in foreclosure suits, a personal judgment against the mortgagor for any deficiency which, when docketed, becomes a lien. But the mere contingent provision for execution in case of deficiency, etc., does not amount to a personal judgment, and to such provision no effect can be given as a lien, until the amount of the deficiency has been ascertained and fixed. And the lien does not commence to run until the deficiency be ascertained, and an execution be issued therefor. *Chapin v. Broder*, 16 Cal. 420.

2. Upon filing a certified copy of a judgment with a county recorder, it becomes a lien upon the debtor's real property in that county for two years from the date of the filing, notwithstanding a lien by virtue of the same judgment has previously existed and expired by lapse of time in another county. *Donner v. Palmer*, 23 Cal. 40.

3. Under section two hundred and seven of the Practice Act, the filing of a transcript of a judgment docket of a District Court with the recorder of any other county makes it a lien upon the real estate in that county, but it does not make it a judgment of the District Court for that county. The county clerk, as such, not the clerk of the District Court, to issue execution. District

Courts have no power to issue writs of assistance in cases of sales upon judgments rendered by justices of the peace or other District Courts. *People v. Doe*, Jan. T. 1867.

§ 208. *Satisfaction of a judgment, how made.*

Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor; or within one year after the judgment by the attorney, unless a revocation of his authority be previously filed. Whenever a judgment shall be satisfied in fact, otherwise than upon an execution, it shall be the duty of the party, or attorney, to give such acknowledgment, and upon motion the Court may compel it, or may order the entry of satisfaction to be made without it.

Bancroft's Forms, 997-1000.

1. A levy under execution on sufficient property to satisfy it, is a satisfaction of the judgment. *People v. Chisholm*, 8 Cal. 30. See also, 23 Id. 94.

2. Before suit was brought the plaintiffs agreed with their attorneys that if the latter brought this action and recovered, they should have one-third of the judgment and costs as compensation. After judgment and execution issued, the plaintiffs compromised with the defendant for less than the amount of the judgment, and entered satisfaction upon the record. Held, that the attorney had no lien on the judgment, and could not disturb the satisfaction entered by the plaintiffs. *Mansfield v. Dorland*, 2 Cal. 507. [See *ex parte Kyle*, 1 Cal. 331.]

3. A tender does not extinguish or satisfy the obligation; an offer to comply with the commands of a judgment does not amount to a satisfaction thereof. *Reddington v. Chase*, Jan. T. 1868.

4. The return of a sheriff indorsed on an execution placed in his hands for collection, that the execution is satisfied by promissory notes received for the amount due on it, it is not evidence of the satisfaction of the judgment on which it was issued, nor can it be admitted in evidence as tending to prove a satisfaction of the same. *Mitchell v. Hockett et al.*, 25 Cal. 542.

5. The plaintiff in an execution may accept of promissory notes by a special agreement, as an absolute payment of the same, but the agreement must be proved by testimony other than the Sheriff's certificate. *Id.*

6. **Discharge of a judgment.**—A payment of part of the amount due upon a money judgment, under an agreement that it shall operate as satisfaction in full, will not discharge the judgment. *Deland v. Hiett*, 27 Cal. 611. [This rule is changed. See Stat. 1867-8, 31.]

TITLE XXI.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

CHAPTER I.—*The execution.*

- SECTION 209. Within what time an execution may issue.
210. Who may issue it; its form; to whom directed; and what it shall require.
211. When all the defendants were not served with summons, what to direct.
212. When made returnable.
213. Money judgments and others, how enforced.
214. Execution after five years.
215. When execution may issue against the property of a party after his death.
216. Execution may be issued to the sheriff of any county; when against the property of the defendant; otherwise when it requires the delivery of real and personal property.
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221. Notice of sale under execution, how given.
222. Selling without notice, what penalty attached.
223. Sales, how conducted; neither the officer conducting it nor his deputy to be a purchaser; real and personal property, how sold; judgment debtor if present may direct order of sale, and the officer shall follow his directions.
224. If purchaser refuses to pay purchase money, what proceedings.
225. Court or Justice may proceed in a summary manner against a purchaser refusing to pay; officer may refuse such purchaser's bid after.
226. These two sections not to make officer liable beyond a certain amount.
227. Personal property capable of manual delivery, how delivered to purchaser.
228. Personal property not capable of manual delivery, how sold and delivered.
229. Real property, when absolute sale or not; in the latter case what the certificate must contain.
230. Real property so sold, by whom it may be redeemed.
231. When it may be redeemed; and redemption money.
232. When judgment debtor or other redemptioner may redeem.
233. In cases of redemption, to whom the payments are to be made.
234. What must a redemptioner do, in order to redeem.
235. Until the expiration of redemption time, Court may restrain waste on the property; what shall be considered waste.
236. Rents and profits, who is to receive.
237. If purchaser of real property be evicted for irregularities in the sale, what shall he recover, and from whom. When judgment to be revived. Petition for the purpose, how and by whom made.

§ 209. *Within what time an execution may issue*

The party in whose favor judgment is given, may, at any time within five years after the entry thereof, issue a writ of execution for its enforcement, as prescribed in this chapter.

N. Y. Code, § 283. See §§ 214, 601, 602. Applicable to Justices' Courts, *post*, § 601, 602.

1. An execution can only be issued upon a judgment obtained before a justice of the peace within five years after the entry of the judgment. *While v. Clark*, 8 Cal. 513. The five years of limitation within which an execution for an unsatisfied balance on a foreclosure sale may be taken out, commences to run from the date of the judgment of foreclosure, and not from the date when the balance was docketed. *Bowers v. Crary*, 30 Cal. 621.

2. Every process which may be required to completely enforce a judgment must be taken within five years after its entry. *Id.*

3. The statute limiting the time for issuing execution upon a judgment to five years after its entry, applies to judgments rendered in suits to foreclose a mortgage, equally as to mere personal judgments. *Stout v. Macy*, 22 Cal. 647.

4. The period during which an execution has been stayed by an order of Court is not to be excluded from the five years, after the lapse of which an order of Court was necessary to obtain an execution. *Solomon v. Maguire*, 29 Cal. 227.

5. If the defendant in a judgment delivers to the plaintiff therein a promissory note of third parties in satisfaction of the same, which is void because fraudulently obtained by defendant from the payors, it is not necessary for the plaintiff to return the note before enforcing his judgment by execution. *Mitchell v. Hockett et al.*, 25 Cal. 544.

6. If an appellate Court affirms the judgment of the Court below, with costs, and upon the filing of its mandate of affirmance in the Court below, an order is made directing a new judgment to be entered up in accordance with the directions of the mandate, such new judgment, although it may be erroneous or irregular, is not void so as to invalidate an execution issued on the same. *Mulford v. Estudillo*, 23 Cal. 94.

7. As soon as the judgment is entered, an execution may issue, whether the judgment roll has been made up or not. *Sharp v. Lumley*, Jan. T. 1868.

§ 210. ¹Who may issue the execution, its form, to whom directed and what it shall require.

The writ of execution shall be issued in the name of the people, sealed with the seal of the Court, and subscribed by the Clerk, and shall be directed to the sheriff, and shall intelligibly refer to the judgment, stating the Court, the county where the judgment roll is filed, and if it be for money, the amount thereof, and the amount actually due thereon, and if made payable in a specified kind of money or currency, as provided in section two hundred of this act, the execution shall also state the kind of money or currency in which the judgment is payable, and shall require the sheriff, substantially as follows :

First—If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment, with inter-

est, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed; or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the recorder of such county, stating such day, or any time thereafter.

Second—If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment, with interest, out of such property.

Third—If it be against the person of the judgment debtor, it shall require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged according to law.

Fourth—If it be issued on a judgment made payable in a specified kind of money or currency, as provided in section two hundred of this act, it shall also require the sheriff to satisfy the same in the kind of money or currency in which said judgment is made payable, and the sheriff shall refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor he shall refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution. The sheriff collecting money or currency in the manner required by this act, shall pay to the plaintiff or party entitled to recover the same, the same kind of money or currency received by him, and in case of neglect or refusal so to do, he shall be liable on his official bond to the judgment creditor in three times the amount of the money so collected.

Fifth—If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, damages, rents, or profits, recov-

ered by the same judgment, out of the personal property of the person against whom it was rendered, and the value of the property for which the judgment was rendered, to be specified therein if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section.

¹Amended 1863. 688. N. Y. Code, § 289. Sec. 210. Abb. Forma, 1839, 1848. Applicable to Justices' Courts.

1. **Issuance of execution.**—A *mandamus* will not lie against the clerk of the District Court to compel him to issue execution. *Goodwin v. Glazer*, 10 Cal. 333; *Miller v. Sanderson*, Id. 490.

2. Where the clerk of the District Court improperly refuses to issue execution on a judgment rendered in the Court of which he is clerk, on the ground that the judgment has been attached at the suit of another party, a bill of equity cannot be sustained to release the attachment and compel the clerk to issue the execution, as the injured party has his remedy at law, by an action on the official bond of the clerk. *Miller v. Sanderson*, 10 Cal. 489.

3. The clerk below can issue execution for damages and costs. *McMillan v. Vischer*, 14 Cal. 232.

4. The clerk of the Court has power to issue a *venditioni exponas* at common law, or under the statute "to regulate proceedings in the District Courts," of 1830, page twenty-four, which authorizes the Court to frame new writs and process, and to issue such executions and other writs as may be necessary to carry their judgment into full force and effect. *Smith v. Morse*, 2 Cal. 524.

5. Where a case is remitted from the Supreme Court to a District Court, the clerk of the latter may issue an execution for the costs accrued thereon without the order of the District Court; nor can the District Court prevent the immediate execution of the judgment. *City of Marysville v. Buchanan*, 3 Cal. 213.

6. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. The Court below can issue execution for these damages and costs. *McMillan v. Vischer*, 14 Cal. 241.

7. An execution must be warranted by the judgment. If it exceeds the judgment, it has no validity. *Davis v. Robinson*, 10 Cal. 411.

8. An order of Court made, staying all proceedings against a petitioner under the Insolvent Law for a discharge from his debts pending his petition, would not prevent the issuance of an execution on a judgment rendered against the petitioner, and a sale of property under the same, within the time limited for the lien of said judgment. *Isaac v. Swift*, 10 Cal. 71.

9. If, as contended in this case, a judgment by default be void, because of the absence of the seal of the District Court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the service of the summons and copy of complaint, or because of irregularities of the clerk, in entering the judgment, the District Court can quash the execution issued on such judgment, and injunction to restrain the enforcement thereof does not lie. *Logan v. Hillegass*, 16 Cal. 200.

10. No execution can issue upon a judgment rendered against a county. When a judgment is rendered against a county it is the duty of the supervisors to apply such funds in the treasury of the county as are not otherwise appropriated to its payment, or if there are no funds, and they possess the requisite power to levy a tax for that purpose, and if they fail or refuse to apply the funds, or to execute the power, resort may be had to a *mandamus*. But if they have no funds, and the power to levy the tax has not been delegated to them, the Legislature must be invoked for additional authority. *Emerie v. Gilman*, 10 Cal. 404.

11. A judgment unreversed and not suspended may be enforced; but when

reversed, it is as if never rendered, and money collected by authority of it may, as a general rule, be recovered back. *Rawn v. Reynolds*, 18 Cal. 275.

12. Where an appellant failed to perfect his appeal bond by justification of his sureties, it was error for the Judge of the Court to make an order of *superseas* staying the execution. *Mok. Hill Canal & M. Co. v. Woodbury*, 10 Cal. 188.

13. Where an execution on a judgment for money is not stayed by the statutory undertaking on appeal, a sale may be had under the execution, and the rights of purchasers are in no respect affected by the subsequent reversal of the judgment. *Farmer v. Rogers*, 10 Cal. 335.

14. The facts upon which a judgment of fraud is found must appear affirmatively in a judgment in order to authorize an arrest on final process. *Matoon v. Eder*, 6 Cal. 60.

15. A confession of judgment to a *bona fide* creditor, and the issuance of execution and making a levy under the same by the judgment debtor without the knowledge of the judgment creditor, done with the knowledge that another creditor is about to attach, and for the purpose of defeating his attachment, is void as to the attaching creditor. *Ryan v. Daly*, 6 Cal. 239.

16. The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the Court issuing the writ. *Gregory v. Ford*, 14 Cal. 143.

17. A Judge at chambers has authority to order a suspension of proceedings under an execution until a motion before the Court to recall or quash it can be heard. *Sanchez v. Carriaga*, 31 Cal. 170.

18. When a judgment is reversed by the Supreme Court, and the case remanded for further proceedings, and the Clerk of the Court below issues an execution for all the costs, as well those of appeal as those accruing before notice of appeal was filed, the Judge of the Court below has power to make an order staying the execution in the hands of the sheriff until an application can be made to the Court to retax and adjust the costs. *Ex parte Burrill et al.*, 24 Cal. 350.

19. If a judgment upon which an execution issues, and the execution itself, are void upon their face, the Court has power, on motion, to afford relief, and can arrest the process. *Sanchez v. Carriaga*, 31 Cal. 170.

20. If, after a judgment recovered by an attaching creditor has been satisfied, he is proceeding to sell attached property under execution, the defendant in the execution may move to quash the writ and not go into equity for relief. *Domec v. Stearns*, 30 Cal. 114.

21. The suit of *seire facias* is a remedy unknown to our practice, and cannot be employed for the revival or enforcement of a judgment. *Humiston v. Smith*, 21 Cal. 129.

22. Under section two hundred and seven of Practice Act, the filing of a transcript of a judgment docket of a District Court with the recorder of any other county, makes it a lien upon the real estate in that county, but it does not make it a judgment of the District Court for that county. The county clerk, as such, not the clerk of the District Court, is to issue execution. District Courts have no power to issue writs of assistance in cases of sales upon judgments rendered by Justices of the Peace or other District Courts. *People v. Doe*, Jan. T. 1867.

23. Where a referee reported as facts the existence and validity of a judgment more than five years old, and also reported a judgment that execution issue on the same, but stated that he had not passed on the question whether the judgment had been paid by an alleged accord and satisfaction: *Held*, that an order of Court confirming the report of the referee does not authorize the issuance of an execution on the judgment. *Solomon v. Maguire*, 29 Cal. 227.

24. A writ of assistance can only issue against the defendants in the suit, and parties holding under them who are bound by the decree. *Burton v. Lies*, 21 Cal. 87.

25. If the Court, in an action to foreclose a mortgage, does not acquire jurisdiction of the person owning the land at the time of the foreclosure, a writ of assistance against the owner or his grantees will be refused. *Steinbach v. Leese*, 27 Cal. 297.

26. *Prima facie*, all who come into possession of land after an action is brought to recover possession of it, must go out, if the plaintiff recover, and a writ of *habere facias possessionem* is issued; for the presumption is, nothing appearing to the contrary, that they came in under the defendant. A person found in possession of land, and turned out by a writ of *habere facias possessionem*, if he was not a party to the suit. *Leese v. Clark*, 29 Cal. 664.

See *post*, § 246, note, No. 66; sub-head, "*Writ of Assistance*."

§ 211. ¹ *When all the defendants were not served with summons, what to direct.*

When a writ of execution is issued on a judgment recovered against two or more persons, in an action upon a joint contract, in which action all the defendants were not served with summons, or did not appear, it shall direct the Sheriff to satisfy the judgment out of the joint property of all the defendants, and the individual property only of the defendants who were served or who appeared in the action. In other respects, the writ shall contain the directions specified in subdivisions one and four of the last section.

¹Amended 1863, 688. Applicable to Justices' Courts.

1. When judgment is taken jointly against two defendants, it makes no difference, so far as they are concerned, whether the sheriff first levied on joint property or not. *Low v. Adams*, 6 Cal. 277.

§ 212. *When made returnable.*

The execution may be made returnable, at any time not less than ten nor more than sixty days after its receipt by the Sheriff, to the Clerk with whom the judgment roll is filed; when the execution shall have been returned, it shall be the duty of the Clerk to attach the same to the judgment roll. If any real estate be levied upon the Clerk shall record the execution and the return thereto at large, and certify the same under his hand as true copies, in a book to be called the "Execution Book," which book shall be indexed with the names of the plaintiffs and defendants in execution alphabetically arranged, and kept open at all times during office hours for the inspection of the public, without charge; and shall be evidence of the contents of the originals whenever they or any part thereof may be destroyed, lost, or mutilated.

¹Amended 1866, 703. See N. Y. Code, § 290. Applicable to Justices' Courts.

1. The time in which a sheriff makes return to an execution does not affect the validity of the execution or of a sale under it. *Low v. Adams*, 6 Cal. 277.

2. A sheriff has no right, after making a return, to amend it so as to affect rights which have already vested. *Newhall v. Provost*, 6 Cal. 86.

3. A sheriff's return is not traversable, and a Court will not permit it to be attacked collaterally, even if the officer is shown to have been guilty of fraud and collusion. *Egery v. Buchanan*, 5 Cal. 56.

4. The return of an attachment cannot be amended so as to postpone the rights of creditors attaching subsequently, but before the correction. *Newhall v. Provost*, 6 Cal. 87; *Webster v. Haworth*, 8 Id. 25.

5. The presumptions are in favor of the regularity of the acts of the officers. *Ritter v. Scannell*, 11 Cal. 248.

6. The term "appurtenances," used in the return of a levy by a sheriff, is too general, vague and indefinite to comprehend in its meaning any personal property as the subject of levy; nothing, therefore, is passed by the sale. *Morroe v. Thomas*, 5 Cal. 470.

7. Courts cannot know an under officer, and the act and return of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal. *Joyce v. Joyce*, 5 Cal. 449. [Affirmed in *Rowley v. Howard*, 23 Cal. 401.]

§ 213. ¹*Money judgments and others, how enforced.*

Where the judgment requires the payment of money or the delivery of real or personal property, the same may be enforced by a writ of execution; when it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same; obedience thereto may be enforced by the Court; and after a final judgment of partition the Court shall have power to enforce a severance of the possession.

¹Amended 1866, 703. Applicable to Justices' Courts.

1. A levy under an execution, upon sufficient personal property to satisfy the same, is a satisfaction of the judgment, sufficient at least to discharge third persons who are liable collaterally or as sureties therefor; and the release of the property from levy thus made, without consent of the parties thus liable, cannot revive their liability. *Mulford v. Estudillo*, 23 Cal. 94.

2. The law does not deem such a payment, but it is a satisfaction or discharge. *Id.* See also 8 Cal. 30.

3. Where process of a Court, as an execution, commanding the sheriff to deliver possession of a chattel, has been finally and completely executed, the power of the sheriff under it, and the authority of the Court to enforce it, cease; and a wrong doer, afterwards trespassing upon the person thus put in possession, cannot be deemed guilty of contempt for disobedience to the process of the Court. *Per Bennett, J. Loring v. Illsley*, 1 Cal. 24.

§ 214. ¹*Execution after five years.*

In all cases, other than for the recovery of money, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the Court, upon motion, or by judgment for that purpose founded on supplemental pleadings.

¹Amended 1866, 704. Applicable to Justices' Courts.

§ 215. ¹*When execution may issue against the property of a party after his death.*

13. The interest of one partner in the partnership chattels is the subject of levy and sale by the sheriff, on an execution against one of the partners. *Jones v. Thompson*, 12 Cal. 191.

14. A deed of bargain and sale to A., in the usual form, had these words in the habendum: "For the use of a Chinese church or place of religious worship and moral instruction, under his direction and in conformity of the rules of the See Yup Company." Held, that the legal title is in A., and that the deed does not raise any use or trust in favor of the grantor of the See Yup Company; that the company has no equitable title or interest in the property by force of the deed. *Eldridge v. See Yup Co.*, 17 Cal. 44.

15. The fact that an individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property as against firm creditors, who have not yet obtained judgment. *Id.*

16. But the sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein. *Jones v. Thompson*, 12 Cal. 191.

17. The interest of one partner in the partnership chattels is the subject of levy and sale by the sheriff on an execution against one of the partners. *Id.*

18. Where a parent executes to his infant son a conveyance of property in consideration of services performed, it must be considered as a voluntary conveyance without legal consideration, as he is not legally bound to pay for his son's services. Such a deed is therefore void against the creditors of the parent, if made when his remaining property is insufficient to pay his debts. *Swartz, Administrator, v. Haslett*, 8 Cal. 118.

19. Real estate of a judgment debtor situated in the county where the judgment before a Justice of the Peace was rendered may be sold on execution upon the judgment, whether a transcript of the judgment be filed in the office of the County Recorder for such county or not. *Bickerstaff v. Dow*, 19 Cal. 109.

20. Property includes a judgment. *Adams v. Hackett*, 7 Cal. 303.

21. Where a partnership, in embarrassed circumstances, converts its means, upon the strength of which it has obtained credit, into real estate, to be claimed as a homestead by one of the firm, for the purpose of placing those means beyond the reach of the creditors, the land is liable to the execution of the creditors, notwithstanding the declaration of homestead. *Bishop v. Hubbard*, 23 Cal. 514.

22. The interest of a mortgagor in a mining claim is liable to attachment and sale under execution, and the purchaser acquires the right of possession as against the mortgagee until foreclosure. *Halsey v. Martin*, 23 Cal. 645.

23. A promissory note is liable to seizure and sale under execution against the holder and payee. By such a sale, the purchaser takes the note upon the same terms upon which he would have taken it had it come into his hands in the ordinary course of business. *Davis v. Mitchell*, Oct. T. 1867.

24. A ferry-boat, used for the transportation of passengers, teams, etc., across a stream, is not exempt from execution because the ferry is on the mail route, and the boat is used also to convey the United States mail across the stream. *Lathrop v. Middleton*, 23 Cal. 257.

25. The purchaser of real estate at execution sale, both before and after the period for redemption expires, has an estate in the land purchased which may be levied on and sold on an execution running against his property. *Pope v. Rogers*, 31 Cal. 293.

26. What property may not be levied on.—The levy upon a sale of a road by virtue of an execution, gives the purchaser no right or title to the same for being the property of the public, the defendant in the execution has no interest therein which can be conveyed by the officer. *Wood et al. v. Truckee Turnpike Co.*, 24 Cal. 474.

27. The private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county. *Emert v. Gilman*, 10 Cal. 404.

28. If the sheriff levies upon the property of a person not a party to the execution, he is responsible in an action at law. *Markley v. Rand*, 12 Cal. 275.

29. A., being indebted to B., delivered a quantity of lumber as security for payment of the debt, with the understanding that B. should proceed and sell the lumber, and pay his debt out of the proceeds. The lumber was afterwards levied upon by the defendants under an execution in their favor against A., as his property. *Held*, that the lumber was not subject to seizure under an execution against A., without payment in the first place of his indebtedness to B. *Swanson v. Sublette*, 1 Cal. 123.

30. A. conveyed land to B., and allowed part of the purchase money to remain unpaid. B. afterwards sold part of the land to C., who had no notice of A.'s lien as a vendor, and gave a mortgage to B. for part of the purchase money. A. obtained judgment against B. for the unpaid purchase money, and levied upon and sold B.'s interest in the land: *Held*, that the purchaser at sheriff's sale did not acquire title to the mortgaged debt due from C. to B. *Bryan v. Sharp*, 4 Cal. 351.

31. The mere fact that the judgment debtor—against whom execution had issued—was found upon the mining ground of plaintiff, did not justify the sheriff, who had the execution, in going on the ground and digging up the soil, and taking the gold it contained. *Rowe v. Bradley*, 12 Cal. 226.

32. After a petition and schedule in insolvency are filed, the control and dominion of the insolvent's property are transferred to the Court. And a creditor cannot, after such filing—certainly not after the order staying proceedings—seize the property. The order operates by its own force from its date, and no notice need be given of it to a sheriff with a writ against the insolvent. *Tuffis v. Manlove*, 14 Cal. 47.

33. An execution levy upon a county's revenues, in the hands of the treasurer, is illegal and void. *Gilman v. Contra Costa County*, 8 Cal. 52.

34. In such case no ouster is necessary to maintain an action of trespass; any unlawful entry is sufficient. An officer, when he puts a receiver in possession of the property of another, against whom he has no process, or asserts through himself, or another, an unlawful dominion over such property, is a trespasser. *Rowe v. Bradley*, 12 Cal. 226.

35. Contingent and complicated contracts cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy and announced at the sale. *Crandall v. Blen*, 13 Cal. 15.

36. *Query*: Whether a chose in action, as a note or judgment, and the like, calling for a definite sum without condition, is the subject of levy any sale? *Id.*

37. And if so, then *query*: Whether such levy and sale can be made without actual possession of the chose by the officer? *Id.* See *Davis v. Mitchell*, Oct. T. 1867.

38. A ferry license, being a franchise, is not the subject of levy and sale under execution. *Thomas v. Armstrong*, 7 Cal. 286; 24 Cal. 474.

39. Things in action are such property as may be levied upon, on execution. *Adams v. Hackett*, 7 Cal. 187.

40. The sheriff may, on the request of the defendant in execution, properly levy on real estate, though there be personal property present amply sufficient to satisfy the execution. *Smith v. Randall*, 6 Cal. 47.

41. A sheriff cannot levy upon money in his own hands belonging to the judgment debtor, when he has received the money on an execution in favor of this debtor. *Clymer v. Willis*, 3 Cal. 363.

42. Property in the custody of the law is not liable to seizure, without an order from the Court having charge thereof. *County of Yuba v. Adams*, 7 Cal. 36.

43. Where money has been placed on general deposit in a bank, and negotiable certificates of deposit have been issued to the depositor for the amount, there is nothing left in the possession of the bankers belonging to the depositor upon which an attachment issued against his property can fasten. The bankers, by their certificates, become liable, not to refund to the depositor the specific

money deposited, but to pay its amount to the holder of the certificate, whoever he may be, on their presentation. *McMillan v. Richards*, 9 Cal. 365.

44. Where A. commences a suit against B. to recover possession of personal property, and, before the suit is commenced, B. has sold the property to C., if A. recovers judgment the property cannot be taken from C., under an execution issued on the judgment for its delivery. *Petree v. Bugbey et al.*, 24 Cal. 423.

45. How levy must be made.—A levy on personal property capable of manual delivery must be made by taking the property in custody. If it is allowed to remain in the hands of the debtor, the levy cannot operate so as to defeat subsequent executions. *Dutertre v. Driard*, 7 Cal. 549.

46. A levy may be good as against the defendant in the writ, and not good as to third persons. The conduct of the defendant may make the levy good, by way of waiver, or estoppel, or agreement. *Tufts v. Manlove*, 14 Cal. 47.

47. As to third persons, there can be no levy when the officer does not know the subject of the levy; as, where he stands at the door of a store which is locked, and keeps others out. The levy dates from the time he gets into the store and takes possession. *Id.*

48. When execution operates, or not, as a lien.—Service of a copy of execution and notice of garnishment upon a third party constitutes no lien on property of the debtor in his hands capable of manual delivery. *Johnson v. Gorham*, 6 Cal. 193.

49. Under our statute an execution affects property only from the time of the levy. *Id.*

50. Satisfaction of execution.—A sheriff, under his general powers, cannot take anything but legal currency in satisfaction of an execution; and when he takes a note, indorses it on the execution, and returns it satisfied, the return is not conclusive, and perhaps not *prima facie* evidence of satisfaction, unless it shows some authority for receiving the note. *Mitchell v. Hackett*, 14 Cal. 661.

51. A levy under execution, on sufficient property to satisfy it, is a satisfaction of the judgment. *People v. Chisholm*, 8 Cal. 29; 32 Cal. 131.

52. Sheriff, his powers and liabilities.—A deputy sheriff who seizes property under an attachment, is not authorized, by virtue of his office, to bind the sheriff by contract for the payment of a keeper to take charge of the property so attached. Special authority for this purpose must be shown. *Krum v. King*, 12 Cal. 412. See further, § 220, *post*. If the officer, by his misconduct, induced a sale of the property for less than it would otherwise have brought, the remedy must be an action for damages resulting from his acts, and not an action to recover the property or its value. *Foster v. Corrad*, Oct. T. 1857.

53. Damages.—The rule giving vindictive or exemplary damages in cases of malicious trespass, applies as well to officers of the law, acting under color of process, as to private persons. *Nightingale v. Scannell*, 18 Cal. 315.

54. In such a suit—the property seized being a merchant's stock in trade—evidence of the *retail value* of the goods is inadmissible as a basis for damages. The object of such evidence is to estimate the profits plaintiff might have made by a sale of the goods; and this would be mere conjecture. The value of the goods was what it would cost in the market to replace them. *Id.*

55. In suit against a sheriff and the plaintiff in a judgment, for a wrongful seizure of property on an execution upon such judgment, the sheriff, who acted without improper motives, cannot be made liable in vindictive or exemplary damages on account of the malicious motives of the plaintiff in the writ. The motives of plaintiff cannot be given in evidence in aggravation of damages against the sheriff. *Id.*

56. Attachment in suit of *B. & Co. v. V., F. & L.*, as firm of *V. & Co.*, under which defendant, as sheriff, seized plaintiff's stock in trade, claiming that *L.* was partner of plaintiff: Held, that in action by plaintiff against sheriff for damages, proof of injury to plaintiff's business as a merchant was inadmissible as a criterion of damage. *Dexter v. Paugh*, 18 Cal. 372.

§ 218. *When property is claimed by a third party, how the right of property to be tried.*

If the property levied on be claimed by a third person as his property, the Sheriff shall summon from his county six persons qualified as jurors between the parties, to try the validity of the claim. He shall also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and the witnesses shall be sworn by the Sheriff, and if their verdict be in favor of the claimant, the Sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon. The fees of the jury, the Sheriff, and the witnesses, shall be paid by the claimant, if the verdict be against him; otherwise by the plaintiff. On the trial the defendant and the claimant may be examined by the plaintiff as witnesses.

Applicable to Justices' Courts.

State and State officers not required to give an undertaking. See *ante*, § 76, note.

1. *Suits by claimants.*—P., in possession of a vessel, appoints a master. The plaintiff, who sets up a claim to the vessel, entered into a charter party with P., and by it acknowledges him to be owner, and H., the master, appointed by P., to be master of the vessel. After the charter party, the declared owner of the vessel became the debtor of the master, who attached the vessel for his debt. The plaintiff brought this action against the sheriff to recover the vessel under the attachment: *Held*, that where one permits another to deal with his property as if it belonged to the latter, and by declarations permits others to be misled, such declarations must be considered as addressed to every one in particular who may give credit upon the strength of them, and the party making those must be concluded. *Hosler v. Hays*, 3 Cal. 302.

2. An officer attaching goods under civil process is entitled to notice of the claim of a third party to the goods, and a demand for them, or he is not liable in damages to such party for such seizure and detention. *Taylor v. Seymour*, 6 Cal. 512; *Daumiel v. Gorham*, Id. 43; *Killey v. Scannell*, 12 Cal. 73.

3. The owner of property attached or levied upon as the property of another, is not conclusively estopped from showing title in himself, because he has given an accountable receipt for its delivery to the officer, although the receipt admits that the property is attached or levied upon as the property of the debtor, if he makes known to the officer his claim at or before the time the receipt is given. But if he fails to make his claim known, and thus influences the conduct of the officer, he is estopped from afterwards asserting it—provided the facts and circumstances relating to his claim were then known to him. *Bleven v. Freer*, 10 Cal. 172.

4. In a suit against the sheriff for not levying the execution, if the sheriff prove a trial by jury and verdict for claimant, the plaintiff must show that he rendered the bond of indemnity to the sheriff required by law. *Strong v. Patterson*, 6 Cal. 166.

5. If several creditors levy, and those prior fail to indemnify the sheriff, he should relinquish the levy of such, and proceed only for the benefit of those who indemnify and incur the responsibility. *Davidson v. Dallas*, 8 Cal. 227.

6. A sheriff is not protected in the sale of personal property by the verdict of

a jury on the trial of the right of property, under the provisions of section two hundred and eighteen of the Code. The proceedings before a sheriff, in such a trial, are not judicial. *Perkins v. Thornburgh*, 10 Cal. 189.

7. To estop a party from claiming goods as against the creditor of a third party, it must appear that he stated to the creditor himself that he had sold the article to the third party, and that the creditor parted with some right or advantage on the faith of the information. *Goodale v. Scannell*, 8 Cal. 27.

8. An agreement to indemnify a sheriff for seizing property under execution is valid, if the parties are in good faith seeking to enforce a legal right. *Stark v. Raney*, 18 Cal. 622.

9. Where the goods of a third party are mixed with the property, or in the apparent possession of the judgment debtor, the sheriff is not liable for levying on them as the property of the debtor, unless there has been notice and demand of the goods by the owner, and a delay or refusal to deliver. *Dawmiel v. Gorham*, 6 Cal. 43.

10. Where no such notice or demand was proved, it was error to charge the jury "that the sheriff was a trespasser, and that they were to find the value of the goods." *Id.*

11. In an action against a sheriff for seizure and conversion of the plaintiff's property taken under process against a third person, a demand upon the defendant prior to the bringing of the suit is not necessary to a recovery. The sheriff having misapplied his process, and whether by mistake or by design will make no difference, stands in the position of every other trespasser, and is liable to an action the instant the trespass is committed. The circumstance that the property was in the possession of the execution debtor at the date of the seizure amounts to nothing, except upon proof of fraud or commixture. The rule of the common law is correctly stated in *Ledley v. Hays*, 1 Cal. 160, and the correctness of that decision is impliedly recognized in *Dawmiel v. Gorham*, 6 Cal. 44. The statement of facts in *Taylor v. Seymour*, 6 Cal. 511, is imperfect; but if that case is to be understood as laying down a different rule, then we prefer to follow *Ledley v. Hays*, 1 Cal. 160. *Bouhaere v. Crockett*, 30 Cal. 190.

12. Where property is levied on by a constable or sheriff by virtue of a writ of attachment or execution, as the property of the defendant in the suit, and claimed by a third party, and a jury is called to try the right of property under the claim, and the verdict of the jury is against the claimant, this verdict is no protection to the officer in a suit brought against him by the defendant, nor is it admissible in evidence as a defense. *Sheldon v. Loomis*, 2 Cal. 122. See *ante*, § 39, note No. 29.

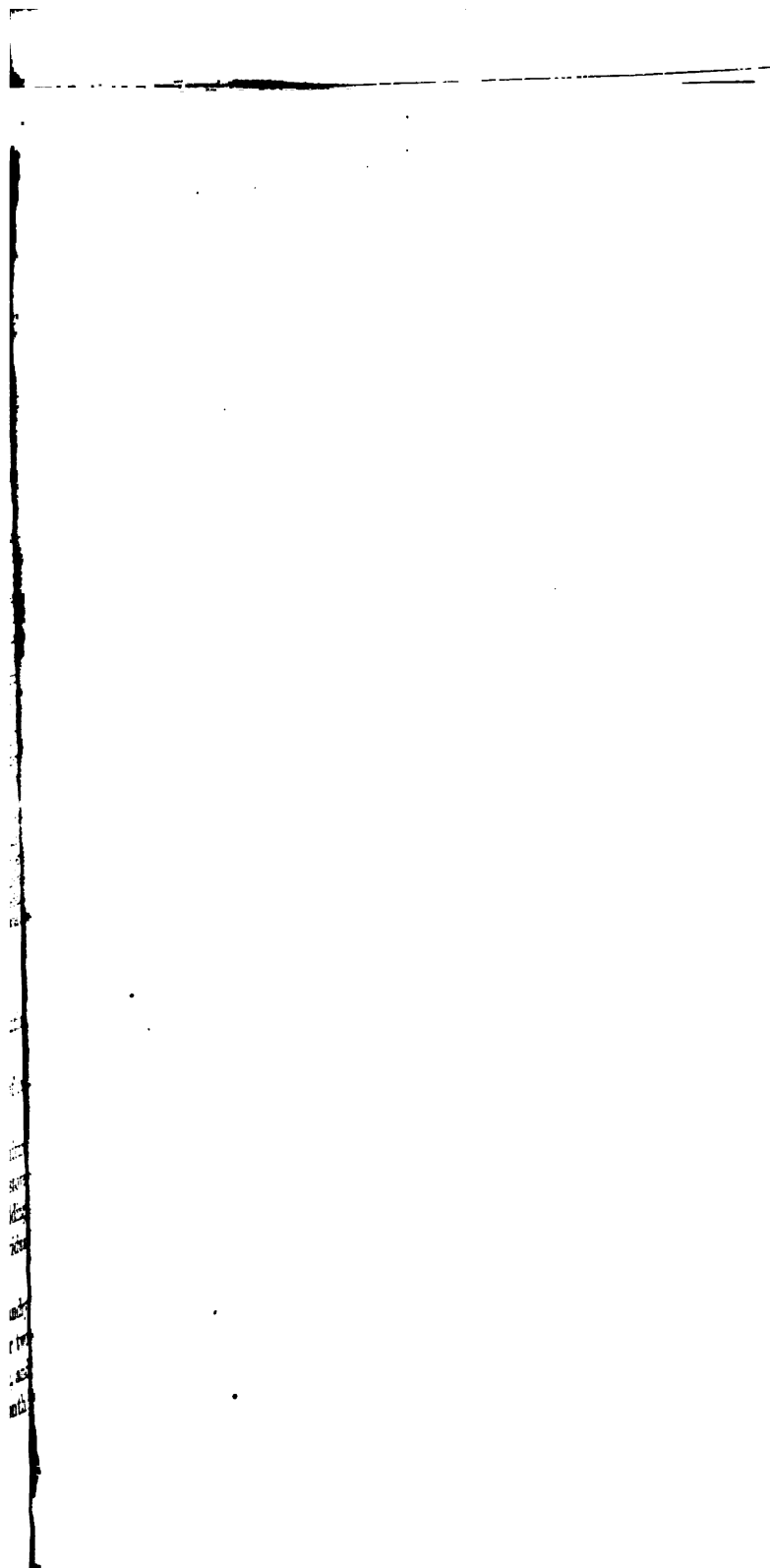
§ 219. ¹What property shall be exempt from execution.

The following property shall be exempt from execution except as herein otherwise specially provided:

First—Chairs, tables, desks, and books, to the value of one hundred dollars, belonging to the judgment debtor.

Second—Necessary household, table, and kitchen furniture belonging to the judgment debtor, including stoves, stove pipe, and stove furniture, wearing apparel, beds, bedding, and bedsteads, and provisions actually provided for individual or family use sufficient for one month.

Third—The farming utensils or implements of husbandry of the judgment debtor; also, two oxen, or two horses, or two mules, and their harness, four cows, one cart or wagon, and food for such oxen, horses, cows, or mules, for one month.



An Act to amend an Act entitled "An Act to regulate proceedings in civil cases in the Courts of Justice of this State," passed April 29th, 1851. Approved April 1, 1872.

SECTION 1.—Section two hundred and nineteen of the above entitled Act is amended to read as follows :

§ 219. The following property shall be exempt from execution, except as herein otherwise specially provided :

1. Chairs, tables, desks, and books, to the value of *two hundred dollars*, belonging to the judgment debtor.

2. Necessary household, table, and kitchen furniture belonging to the judgment debtor, including *one sewing machine*, stoves, stove-pipes and stove furniture, wearing apparel, beds, bedding and bedsteads, provisions actually provided for individual or family use sufficient for *three months*, and *two cows and their sucking calves*, and *food for such cows for one month*.

3. The farming utensils or implements of husbandry of the judgment debtor; also, two oxen, or two horses, or two mules, and their harness, four cows with their sucking calves, *five head of hogs*, *two dozen domestic fowls*, *one cart or wagon*, and *food for such oxen, horses, mules, cows, hogs or fowls for one month*; also, all seed grain or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars.

4. The tools or implements of a mechanic or artisan necessary to carry on his trade; *the notarial seal and records of a Notary Public*; the instruments and chest of a surgeon, physician, surveyor or dentist, necessary to the exercise of their profession, with their scientific and professional libraries; the law libraries of attorneys and counselors, and the libraries of ministers of the gospel, *editors, school teachers, and professors of music*; also, *the musical instruments of a professor of music*.

5. The cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars; also his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements, and appliances, necessary for carrying on any kind of mining operations, not exceeding in value the aggregate sum of five hundred dollars; and two horses, mules or oxen, with their harness; and food for such horses, mules, or oxen, for one month, when necessary to be used in any whim, windlass, derrick, car, pump, or hoisting gear; and also, *his mining claim actually worked by him, not exceeding in value the sum of one thousand dollars*.

6. Two oxen, two horses, or two mules, and their harness; and one cart or wagon, one dray or truck, one coupee, one hack or carriage for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living; and one horse, with vehicle and harness or other equipments, used by a physician, surgeon, or minister of the gospel, in making his professional visits; with food for such oxen, horses or mules, for one month.

7. All fire engines, hooks and ladders, with the carts, trucks, and carriages, hose, buckets, implements and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any law of this state.

8. All arms, uniforms, and accoutrements, required by law to be kept by any person, and one shot or rifle gun.

9. All court-houses, jails, public offices and buildings, lots, grounds and personal property, the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the court-house, jail and public offices, belonging to any county of this state; and all cemeteries, public squares and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state; but no article or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price, or upon a mortgage thereon.

10. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy, execution or levy of attachment, when it appears by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family residing in this state, supported wholly or in part by his labor.

11. *The shares held by a member of a homestead association, duly incorporated, not exceeding in value one thousand dollars, if the person holding the shares is not the owner of a homestead under the laws of this state; all the nautical instruments and wearing apparel of any master, officer or seaman, of any steamer, or other vessel.*

§ 12. This Act shall take effect immediately.

Insolvent company organized under the laws of this State, but no article or species of property mentioned in this section shall be exempt from execution issued upon a judgment recovered for its price, or upon a mortgage thereon.

Tenth—The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or levy of attachment, when it shall be made to appear by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family residing in this State, supported wholly or in part by his labor.

[Approved March 25th, 1870.

Runs sixty days.]

this State.

Eighth—All arms, uniforms, and accoutrements, required by law to be kept by any person.

Ninth—All Court-houses, Jails, public offices, and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances, belonging and pertaining to the Court-house, Jail, and public offices belonging to any county of this State, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings

*An Act to amend an Act entitled "An Act to regulate proceed-
ings in civil cases in the State of Texas"*

hack or carriage for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living; and one horse, with vehicle and harness or other equipments, used by a physician, surgeon, or minister of the gospel, in making his professional visits; with food for such oxen, horses or mules, for one month.

7. All fire engines, hooks and ladders, with the carts, trucks, and carriages, hose, buckets, implements and apparatus thereunto appertaining, and all furniture and uniforms of any fire company or department organized under any law of this state.

also, all seed grain or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars.

Fourth—Tools or implements of a mechanic or artisan necessary to carry on his trade, the instruments and chest of a Surgeon, Physician, Surveyor, and Dentist, necessary to the exercises of their profession, with their scientific and professional libraries; the law libraries of Attorneys and Counselors, and the libraries of Ministers of the Gospel.

Fifth—The cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars; also, his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements, and appliances necessary for carrying on any kind of mining operations, not exceeding in value the aggregate sum of five hundred dollars; and two horses, mules, or oxen, with their harness, and food for such horses, mules, or oxen, for one month, when necessary to be used for any whim, windlass, derrick, car, pump, or hoisting gear.

Sixth—Two oxen, two horses, or two mules, and their harness, and one cart or wagon, by the use of which a cartman, huckster, peddler, teamster, or other laborer habitually earns his living; and one horse, with vehicle and harness or other equipments, used by a Physician, or Surgeon, or Minister of the Gospel in making his professional visits, with food for such oxen, horses, or mules, for one month.

Seventh—All fire engines, hooks and ladders, with the carts, trucks, and carriages, hose, buckets, implements, and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any law of this State.

Eighth—All arms, uniforms, and accoutrements, required by law to be kept by any person.

Ninth—All Court-houses, Jails, public offices, and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances, belonging and pertaining to the Court-house, Jail, and public offices belonging to any county of this State, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings

for the use of the fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament, or public use, or for the use of any fire or military company organized under the laws of this State; but no article or species of property mentioned in this section shall be exempt from execution issued upon a judgment recovered for its price or upon a mortgage thereon.

Tenth—The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution (or levy of attachment), when it shall be made to appear by the debtor's affidavit or otherwise, that such earnings are necessary for the use of his family residing in this State, supported wholly or in part by his labor.

¹ Amended 1854, 89; 1862, 573; 1864, 523. Applicable to Justices' Courts.

1 **Earnings of the judgment debtor.** See further, *post*, § 243.

2. **Sewing machines exempt.**—Statutes 1864, 92: In addition to the property now exempted by law from sale or levy on execution, there shall be exempted one sewing machine, of a value not exceeding one hundred dollars, in actual use by each debtor or the family of the debtor.

3. **Life insurance exempt.**—Statutes of 1867-8, page 500: Section 1. No money, benefit, right, privilege or immunity accruing or in any manner whatever growing out of any life insurance on the life of the debtor, made in any insurance company incorporated under the laws of this State, shall be subject to levy under attachment or execution, or under any original mesne or final process whatever against such debtor, or to be taken, sequestered, or reached by any proceeding supplementary to execution or other like proceeding; *provided*, however, this exemption shall not extend beyond such moneys, benefits, rights, privileges and immunities as have been or might have been secured by the payment of an annual premium not exceeding five hundred dollars.

4. **Searchers of records, books, maps, etc., exempt.**—Statutes 1867-8, 126: Sec. 1. The books, papers, maps and diagrams of a person engaged in searching records and making abstracts of titles, used in such business, shall be exempt from execution in all cases, except upon a judgment recovered for the purchase money thereof or upon a mortgage thereon.

Sec. 2. This Act shall take effect and be in force from and after its passage.

5. **Lots in cemeteries and pews in churches exempt.**—Statutes of 1861, 565-566: Section 1. All lots of land owned, used or occupied by any person, or by any person in joint tenancy, or tenancy in common with any person or persons, in any graveyard or cemetery, or other place, for the sole purpose of burying the dead, not exceeding one quarter of an acre in size, together with the railing or fencing inclosing the same, and all gravestones, tombstones, monuments and other appropriate improvements thereon erected, are hereby exempted from levy and forced sale, by virtue of any writ, order, judgment or decree, or by any legal process whatever. And in case of religious or benevolent associations or corporations, the amount of land so exempt for the purposes aforesaid may extend to not exceeding five acres: *provided*, that not more than

one lot of land shall be held exempt by such person, or by him in joint tenancy or tenancy in common with any person or persons, or by any such association or corporation. In any one cemetery, graveyard or other place; and provided, further, that the provisions of this act shall not be deemed to apply to land held by any person or persons, association or corporation, for the purpose of sale or disposition, as burial lots or otherwise.

Sec. 2. All pews in churches and meeting houses used for religious purposes, owned and claimed by any person, or held agreeably to the rules and regulations of such churches, are hereby exempt from levy and sale on any writ or legal process, or by operation of any law whatever.

6. **Homestead, exemption of.**—Hittell's Dig., paragraph 35, 41-60. See, also, stat. 1867-8, page 116, which extends the right to homesteads held in joint tenancy, tenancy in common, or where the claimant owns only an undivided interest therein; it also applies to all homesteads heretofore recorded.

7. **Wagon, hackney coach.**—In the act which exempts certain articles from execution, the term "wagon" is intended to mean a common vehicle for the transportation of goods, wares and merchandise. *Quigley v. Gorham*, 5 Cal. 418. A hackney coach used for the conveyance of passengers is a different article, and does not come within the equity or literal meaning of the act. *Quigley v. Gorham*, 5 Cal. 418.

8. **Team.**—Where two mules are claimed as exempt from forced sale on execution, it must be shown that the party claiming the mules habitually earned his living by the use of the animals in question, or that he is one of the persons mentioned in the statute. *Calhern v. Knight*, 10 Cal. 393.

9. **Horses.**—An execution debtor, who has more horses than the number exempt by law, may elect which he claims as exempt, but such election must be made and the officers notified thereof either at the time of the levy, or within a reasonable time thereafter, or the right to elect will be deemed waived. *Boland v. O'Neal*, 22 Cal. 504. Affirmed in *Gavitt v. Doub*, 23 Cal. 78.

10. Where two or several horses, owned by an execution debtor, were levied upon and no notice of claim of exemption was given to the officer until the day of sale, which was four months after the levy: *Held*, that the right of election had been lost by the unreasonable delay in exercising it; and that the officer was justified in selling the property. *Boland v. O'Neal*, 22 Cal. 504.

11. In determining whether notice of claim of exemption of property levied upon was given by the debtor within a reasonable time, the fact that the plaintiff had at the time of the levy other property of a similar character out of which the debt might have been made, is proper matter of proof. *Id.*

12. The exemption of property from sale on execution is a personal right which the debtor may waive or claim at his election. *Id.*

13. **Household furniture.**—Where certain household furniture is claimed as exempt from execution, the fact that the number of beds claimed—six in all—is greater than is required for the immediate and constant use of the family, is no objection. Such a construction of the statute would be too narrow. *Harrell v. Parsons*, 15 Cal. 266.

§ 220. Writ, how executed.

The Sheriff shall execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient; collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment, or depositing the amount with the Clerk of the Court; any excess in the proceeds over the

judgment and the Sheriff's fees shall be returned to the judgment debtor. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and the Sheriff's fees, within the view of the Sheriff, he shall levy only on such part of the property as the judgment debtor may indicate: *provided*, that the judgment debtor be present at and indicate at the time of the levy, such part; and *provided*, that the property indicated be amply sufficient to satisfy such judgment and fees.

Applicable to Justices' Courts. "Preferred claims," writ, how executed. See *ante*, § 120, note (a).

1. The general statute defines the duties of the sheriff in respect to final process. It declares, "that the sheriff shall execute the writ (of *feri facias*) by levying, etc., and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment, etc., and if there be any excess, he shall return the same to the judgment debtor." These acts are to be construed in *part materia*. *Wilson v. Broder*, 10 Cal. 486.

2. Notice of motion to set aside an execution and a levy made thereunder will not operate as a stay of proceedings. *Byran v. Berry*, 8 Cal. 130.

3. Where a sheriff or constable seizes the property of one man under an execution against another, he is a trespasser, and liable on his official bond. *Van Pelt v. Littler*, 14 Cal. 184; 30 Cal. 190; 12 Cal. 277.

4. Where an execution on a judgment for the recovery of money is stayed by the undertaking on appeal required by statute for that purpose, a sale may be made on the execution; and the rights of purchasers are in no respect affected by the subsequent reversal of the judgment. *Farmer v. Rogers*, 10 Cal. 335.

5. This section was evidently enacted for the benefit of the debtor. *Smith v. Randall*, 6 Cal. 47.

6. Where the execution debtor owns property jointly with another, a sheriff, who has such execution, has the right to levy on such property, and take it into possession for the purpose of subjecting it to sale. *Waldman v. Broder*, 10 Cal. 378; *Bernal v. Hovious*, 17 Cal. 542; 12 Cal. 198.

7. If the master of a vessel be a part owner, his interest in the vessel may be levied on and sold, but his agency as master will in no wise be affected. *Loring v. Illsley*, 1 Cal. 31.

8. Contingent and complicated contracts cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and *chose in action*, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose be given by the levy, and announced at the sale. *Crandall v. Elm*, 13 Cal. 15.

9. The assent of an ordinary agent, who had general charge of his principal's affairs during his temporary absence, will not justify the sheriff who holds an execution against a third person in levying upon property in the possession of the principal in her absence. *Fitch v. Brockman*, 2 Cal. 578.

10. Where an order of Court directed the sheriff to seize certain specific property, and the property proved not to belong to the defendant in the suit, the sheriff was held liable to the owner. *Rhodes v. Patterson*, 3 Cal. 470.

11. Under our statute an execution affects property only from the time of the levy; and service of a copy of an execution constitutes no lien on property capable of manual delivery. *Johnson v. Gorham*, 6 Cal. 196; *Dutcher v. Driard*, 7 Id. 551.

12. The mere fact that the judgment debtor (against whom execution had issued) was found upon the mining ground of plaintiff, did not justify the

sheriff who had the execution in going on the ground and digging up the oils and taking the gold it contained. *Rowe v. Bradley*, 12 Cal. 230.

13. The fact that an individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property as against firm creditors who have not yet obtained judgment. *Conroy v. Woods*, 13 Cal. 631.

14. The remedy, by motion, against a sheriff and his sureties, to compel him to pay over money collected on execution, was only given for cases of intentional delinquency on the part of the sheriff, as a punishment for his willful or corrupt neglect of duty, and was not designed to embrace a case in which he declined to pay over moneys collected under circumstances of a *bona fide* well grounded doubt of the authority of the party to demand it. *Wilson v. Broder*, 10 Cal. 496.

15. While the interest of the pledgor may be reached under an execution, it can only be done by serving a garnishment on the pledgee, and not by a seizure of the pledge. *Treadwell v. Davis*, April T. 1868.

16. A levy made by a constable on goods which he does not see or have in his possession is void. *Herron v. Hughes et al.*, 25 Cal. 563.

17. When exemption may be claimed.—Where a party was absent in San Francisco at the time such furniture was sold on execution, on account of sickness in his family, it is sufficient excuse for not claiming the exemption at the time, the defendant (plaintiff in execution) being aware of such claim, it having been made on a previous seizure. *Haswell v. Parsons*, 15 Cal. 266.

18. See further *ante*, § 219, note No. 10.

§ 221. ¹Notice of sale under execution, how given.

Before the sale of property on execution, notice thereof shall be given as follows :

First—In case of perishable property, by posting writter notice of the time and place of sale in three public places of the township or city where the sale is to take place. for such a time as may be reasonable, considering the character and condition of the property.

Second—In case of other personal property, by posting a similar notice in three public places in the township or city where the sale is to take place, not less than five nor more than ten days successively.

Third—In case of real property, by posting a similar notice, particularly describing the property, for twenty days successively, in three public places of the township or city where the property is situated, and also when the property is to be sold, and publishing a copy thereof once a week for the same period in some newspaper published in the county, if there be one.

Fourth—When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this section shall state the kind of money or currency in which bids may be

made at such sale, which shall be the same as that specified in the judgment.

¹Amended 1869, 689. Applicable to Justices' Courts. Bancroft's Forms, 811-812.

1. Although the officer neglects to give the notice, the sale shall not be void. *Smith v. Randall*, 6 Cal. 47; *Harvey v. Frisk*, 8 Id. 93.

§ 222. *Selling without notice, what penalty attached.*

An officer selling without the notice prescribed by the last section, shall forfeit five hundred dollars to the aggrieved party, in addition to his actual damages; and a person willfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment (if the judgment be satisfied before sale), shall forfeit five hundred dollars.

Applicable to Justices' Courts.

1. If the sheriff, before sale of real estate under execution, neglects to give the proper notice, the statute gives an adequate remedy against the officer. There is not sufficient cause to set aside or avoid the sale. *Smith v. Randall*, 6 Cal. 47.

2. An action cannot be maintained by the defendant in an execution to recover of the officer the penalty prescribed by section 222 of the Practice Act for selling without proper notice, unless by a sale so made the complainant has been deprived of his property. If the attempted sale is a nullity, and passes no title, no injury has been sustained, and no right of action for the forfeiture accrues. *Askeu v. Ebberts*, 22 Cal. 263.

3. No right of property vests in the purchaser at an execution sale until he pays the purchase money, and until this is done, the sale is not so far perfected as to constitute the foundation of an action to enforce a forfeiture for selling without the prescribed notice. *Id.*

4. In an action to enforce a penalty or forfeiture imposed by statute, the claim is to be strictly construed. *Id.*

§ 223. *Sales, how conducted; neither the officer conducting it, nor his deputy to be a purchaser; real and personal property, how sold; judgment debtor, if present, may direct order of sale, and the officer shall follow his directions.*

All sales of property under execution shall be made at auction to the highest bidder, and shall be made between the hours of nine in the morning and five in the afternoon; after sufficient property has been sold to satisfy the execution, no more shall be sold. Neither the officer holding the execution, nor his deputy, shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it shall be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, and consisting of several known lots

or parcels, they shall be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately; and the Sheriff shall be bound to follow such directions.

Applicable to Justices' Courts.

1. The regularity of a sheriff's sale cannot be impeached by a stranger, or in a collateral proceeding. *Kelsey v. Dunlap*, 7 Cal. 160.

2. Where an execution on a judgment for the recovery of money is not stayed by the undertaking on appeal required by statute for that purpose, a sale may be made on the execution, and the rights of purchasers are in no respect affected by the subsequent reversal of the judgment. *Farmer v. Rogers*, 10 Cal. 335.

3. By the statute of 1860, personal property levied on by the sheriff must be actually seized and sold in presence of the purchaser. While a lien attaches to real estate upon the filing of the transcript, and the same is to be sold in front of the Court-house door, and all leasehold estates of more than one year are to be so disposed of. *Smith v. Morse*, 2 Cal. 524.

4. A debtor in default has no vested right to have his property sold in a particular way; and third persons, not parties to the contract, have no vested right to purchase the property of a common debtor sold at the instance of another creditor. *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515.

5. The rules of equity proceedings require, in such cases, not only that the property should be sold in parcels, but that property included in a first mortgage should be exhausted before recourse is had to a second, in order that the amount of redemption may be accurately ascertained. *Rawn v. Reynolds*, 11 Cal. 14.

6. Where the land sold under execution consisted of separate but adjoining tracts, but the sheriff and the purchaser were ignorant of the subdivisions, and the defendant failed to inform the sheriff of the fact, or to direct a sale by parcels: *Held*, that the sale of the land, in gross, was valid. *Smith v. Randall*, 6 Cal. 47.

7. Inadequacy of price, though a fact admissible in evidence to establish fraud, is never of itself sufficient to annul a sale under execution. *Id.*

8. A sale in mass, under a writ of execution, of real estate, consisting of several known and distinct parcels, at a price greatly below the actual value of the property, cannot be sustained against the objection of the judgment debtor. *San Francisco v. Pizley*, 21 Cal. 56.

9. Such sales are not absolutely void, but are voidable, and will be set aside upon reasonable and proper application, when there is reasonable ground for belief that they were less beneficial to the creditor or debtor than they would have been had a different mode been pursued. *Id.*

10. Under an execution against the city and county of San Francisco, the sheriff sold a tract of land belonging to the corporation, one mile in length and a half a mile in width, which had long previous to the sale been laid out by the city authorities into blocks and streets of designated dimensions and boundaries, and marked upon the official map of the city; part of the land lay under the tide waters of the bay of San Francisco, and the dry land was intersected by a navigable stream. The property was sold in mass for three hundred and sixty dollars, and was worth at the time about \$75,000. *Held*, that upon application by the judgment debtor, the sale was properly set aside, on account of the manner in which it had been made. *Id.*

11. When the application to set aside a voidable sale, under execution, should be made by motion, and when by bill in equity, discussed. *Id.*

12. The term "appurtenance," used in the return of a levy by a sheriff, is too general, vague and indefinite, to comprehend in its meaning any personal property as the subject of levy. Nothing, therefore, is passed by the sale. *Monroe v. Thomas*, 5 Cal. 470.

13. If the sheriff, before a sale of real estate under execution, neglects to give the proper notice, the statute give an adequate remedy against the officer, there is not sufficient cause to set aside or avoid the sale. *Smith v. Randall*, 6 Cal. 47.

14. A Court of equity will not set aside a sheriff's sale and a deed executed under it in a collateral action commenced for that purpose by reason of irregularities in the conduct of the officer in making the levy and sale. *Boles v. Johnston*, 23 Cal. 226.

15. If parties have any remedy under such circumstances, it is by motion properly made in the Court where judgment was rendered to set aside the sale. *Id.*

§ 224. *If purchaser refuses to pay purchase money, what proceedings.*

If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, by motion upon previous notice of five days before any Court, or before any Justice of the Peace, if the same shall not exceed his jurisdiction.

Applicable to Justices' Courts.

1. A purchaser at a sheriff's sale acquires no right whatever against the sheriff for property sold, unless at the time of the sale he pays down in cash the whole of the purchase money. *The People v. Hays*, 5 Cal. 66; *Williams v. Smith*, 6 Cal. 91; *Harvey v. Fisk*, 9 Cal. 93.

2. In an action against a purchaser at sheriff's sale for not paying the amount of his bid, it cannot be set up in defense that no sufficient notice of the sale was given. If such be the fact, the recourse of the purchaser is against the sheriff. *Harvey v. Fisk*, 9 Cal. 93.

3. The nature and extent of the relief in such case are matters resting very much in the sound discretion of the Court. As a general rule, the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or to the parties, to allow the sale to stand. But when relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems that the ordinary rules as to mistakes of law should apply; and from such, Courts of equity seldom relieve. *Goodenow v. Ever*, 16 Cal. 461.

4. *Held*, also, that plaintiffs cannot be reimbursed in the amount bid, even though they acted under a mistake as to the effect of the decree and sale thereunder; that their mistake was one of law, against which Courts of equity seldom relieve in an independent action—the weight of authority in the United States being not to relieve, unless the mistake be accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence. *Id.*

5. Where a party purchased real estate at an execution sale, upon the faith of the representations of the judgment creditor that his judgment was the first

on the property, when in fact there were prior incumbrances on it of more than its value: *Held*, that the purchaser should be relieved, and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations. *Webster v. Haworth*, 8 Cal. 21.

6. The doctrine of *caveat emptor* applies only to sales made upon valid judgments, and is usually invoked with reference to sales upon execution issued against the general property of a judgment debtor: In these latter cases, a defect of the title is no ground for interference with the sale, or a refusal to pay the price bid. The purchaser takes upon himself all the risks as to the title, and bids with full knowledge that in any event he only acquires such interest as the debtor possessed at the date of the levy, or the lien of the judgment, and that he may possibly acquire nothing. *Boggs v. Hargrave*, 16 Cal. 559.

7. A somewhat different rule prevails in cases where particular property is the subject of sale by a specific adjudication, as where the interests of A., in a certain tract, is decreed to be sold. To the validity of a decree of this character the presence of A. is essential; and when present, the decree binds him, and is effectual, by the sale it orders, to transfer his estate. A valid decree in a mortgage case operates upon such interest as the mortgagor possessed in the property at the execution of the mortgage. The interest may not constitute a valid title—it may not, in fact, be of any value, and the purchaser takes that risk. To that extent the doctrine of *caveat emptor* applies even in those cases, and in all cases of adjudication upon specific interests, but no further. The interest specifically subject to sale, whatever it may be worth, a purchaser is entitled to receive; it is for that interest he makes his bid and pays his money. *Id.*

8. A *mandamus* will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase money, on the ground that he is entitled to it as oldest judgment and execution creditor, especially when there is an unsettled contest as to the priority of his lien. *Williams v. Smith*, 6 Cal. 91.

9. It makes no difference whether the misrepresentations were made willfully or ignorantly, or that the action against the purchaser was brought in the name of the sheriff. *Webster v. Haworth*, 8 Cal. 21.

10. Ordinarily, the maxim of *caveat emptor* applies to judicial sales, but it has many limitations and exceptions. *Id.*

11. The provisions of law will be enforced, unless fraud is proven between the officer and second purchaser. *Harvey v. Fisk*, 9 Cal. 93.

12. In a proceeding by motion under section two hundred and twenty-four of the Practice Act, to compel payment by a delinquent purchaser at judicial sale, the statement of the sheriff upon which the motion is based need not state in terms that "loss was occasioned by a failure to pay the amount bid;" an averment of the amount of the bid, and a resale at a specified smaller amount, is sufficient. *Johns v. Trick*, 22 Cal. 511.

§ 225. *Court of Justice may proceed in a summary manner against a purchaser refusing to pay; officer may refuse such purchaser's bid after.*

Such Court of Justice shall proceed in a summary manner and give judgment, and issue execution therefor forthwith, but the defendant may claim a jury. And the same proceedings may be had against any subsequent purchaser who shall refuse to pay, and the officer may, in his discretion, thereafter reject the bid of any person so refusing.

Applicable to Justices' Courts.

§ 226. *These two sections not to make officer liable beyond a certain amount.*

The two preceding sections shall not be construed to make the officer liable for any more than the amount bid by the second, or subsequent purchaser, and the amount collected from the purchaser refusing to pay.

Applicable to Justices' Courts.

1. Where a sheriff fails to pay over money collected on execution, the action should be for a false return. *Egery et al. v. Buchanan et al.*, 5 Cal. 53.

3. The statute penalties against sheriffs, for the non-payment of moneys collected on execution, are only recoverable when the sheriff, by his return, admits the collection of the money, but refuses to pay it over. *Id.*

§ 227. *Personal property not capable of manual delivery, how delivered to purchaser.*

When the purchaser of any personal property capable of manual delivery shall pay the purchase money, the officer making the sale shall deliver to the purchaser the property, and if desired shall execute and deliver to him a certificate of the sale and payment. Such certificate shall convey to the purchaser all the right, title and interest which the debtor had in and to such property on the day the execution was levied.

Applicable to Justices' Courts.

§ 228. *Personal property not capable of manual delivery, how sold and delivered.*

When the purchaser of any personal property not capable of manual delivery shall pay the purchase money, the officer making the sale shall execute and deliver to the purchaser a certificate of sale and payment. Such certificate shall convey to the purchaser all right, title, and interest which the debtor had in and to such property on the day the execution was levied.

Applicable to Justices' Courts. Bancroft's Forms, 218.

1. The purchaser of a judgment on sale under execution and levy takes as assignee only, assuming that a judgment is the subject of levy and sale. The sheriff's sale of a judgment passes no title other than would pass by an assignment by the owner. *Fore v. Manlove*, 18 Cal. 436.

2. The word "officer," in the two previous sections, refers to the incumbent at the time of the act of sale; and if he be dead, his successor cannot perform the duty. *People v. Boring*, 8 Cal. 406.

3. How the act is to be done in such a case, discussed and suggested. *Id.*

4. A sheriff's bill of sale of personal property sold on execution need not contain all the formalities of a regular certificate. *Lay v. Neville*, 25 Cal. 551.

5. When a sheriff sells personal property on an execution, where he has no

authority to do so, if the execution defendant is present and consents to the sale being made, the purchaser will acquire a good title as against the defendant in the execution. *Id.*

§ 229. *Real property, when absolute sale or not; in the latter case, what the certificate must contain.*

Upon a sale of real property, the purchaser shall be substituted to and acquire all the right, title, interest and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute. In all other cases, the property shall be subject to redemption, as provided in this chapter. The officer shall give to the purchaser a certificate of sale containing:

First—A particular description of the real property sold.

Second—The price bid for each distinct lot or parcel.

Third—The whole price paid.

Fourth—When subject to redemption, it shall be so stated.

And when the judgment, under which the sale has been made, is made payable in a specified kind of money or currency, the certificate shall also state the kind of money or currency in which such redemption may be made, which shall be the same as that specified in the judgment. A duplicate of such certificate shall be filed by the officer in the office of the Recorder of the county.

¹Amended 1863, §89. Applicable to Justices' Courts. Bancroft's Forms, 219.

1. *Query*: What is the effect, under our system, of a sale of land under execution to the execution creditor; does it pass any greater title in the premises than that actually held by the defendant in execution? *Eldridge v. See Fup Co.*, 17 Cal. 44.

2. A description in a sheriff's return of city lots by numbers, referring to the official city map, is sufficient. *Welch v. Sullivan*, 8 Cal. 165.

3. The decisions as to the estate of the judgment debtor after sale become authorities for determining the estate of the mortgagor after sale under the decree, and from them it will be found that the estate must remain in the mortgagor until a consummation of the sale by conveyance, as it does in the judgment debtor; and that the conveyance, when executed, will take effect, in the one case, from the date of the mortgage, as it does in the other from the time the lien of the judgment attached. *McMillan v. Richards*, 9 Cal. 365.

4. Until a consummation of a sale of real property upon execution is made by a conveyance from the sheriff, the estate remains in the judgment debtor. Until then, the purchaser possesses only a right to an estate which may afterwards be perfected by conveyance. *Cummings v. Coe*, 10 Cal. 529.

5. The title of a purchaser of real estate at sheriff's sale does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of the officer in this respect. *Cloud v. El Dorado County*, 12 Cal. 128; *Clark v. Lockwood*, 21 Cal. 220.

6. *What title execution purchaser acquires.*—The purchaser of real

estate sold on execution, upon the delivery to him of the sheriff's certificate of sale, acquires a species of conditional equitable estate in the land, subject to be defeated only by a redemption within the time allowed by law, leaving the legal title with the right of redemption only in the judgment debtor, which the sheriff may convey to the purchaser by executing a deed to him after the expiration of the period allowed for redemption. *People v. Doe*, 31 Cal. 220.

7. If a recorder has a place in his office where he keeps sheriff's certificates of sale, and a given certificate is not kept in that place, but in another and different place, its filing does not give notice to third persons of its existence or contents. *Page v. Rogers*, 31 Cal. 293.

8. The purchaser of land at sheriff's sale does not by his purchase acquire the title to the land. The title passes by the execution and delivery of the sheriff's deed. The purchaser, prior to the execution of the sheriff's deed, holds merely a lien upon the land. *People v. Mayhew*, 26 Cal. 655; [see *Beber v. McLellan*, 30 Cal. 135.]

9. One who receives an assignment of a sheriff's certificate of sale of land as security against his liability for debts of the judgment debtor, with an agreement that he will cancel the same when the debts are paid, and his liability is discharged, ceases to have any interest in the certificate when the debts are paid, and if he afterwards obtains a sheriff's deed, neither he nor his assignee with notice acquire any title to the land. *Beber v. McLellan*, 30 Cal. 135.

10. A duplicate of a sheriff's certificate of sale of land was deposited by the sheriff with the recorder of the proper county, endorsed, "filed" by the latter officer, recorded as a deed in a book of records of deeds, and regularly indexed as a deed, and afterwards placed in a file of recorded deeds, but not with a file of certificates of sales, where it remained in said recorder's office till the time of the trial of the case, some ten years afterwards. *Held*, that notice was imparted to subsequent purchasers by the instrument thus deposited and preserved. *Page v. Rogers*, 31 Cal. 293.

11. The filing of a sheriff's duplicate certificate of sale in the office of the county recorder, imparts constructive notice of the estate [acquired under it to subsequent purchasers and attaching creditors, and such notice continues after the time for redemption has expired, and until the sheriff's deed has been delivered and recorded. *Id.*

12. The purpose of filing a duplicate of a certificate of purchase made at execution sale, is to give notice to third persons of its existence and contents. *Id.*

13. Purchasers at sheriff's sale.—January 26th, 1855, a judgment against C. became a lien on his land. May 7th, 1855, R. purchased the land at sheriff's sale, made on an execution issued on the judgment, and received a certificate, and a duplicate was filed in the office of the recorder. A judgment in favor of H. against C. became a lien on the same land March 1st, 1856. November 17th, 1855, H. purchased at sheriff's sale, made on an execution issued on his judgment, the same land, and a certificate of sale was made on him, and a duplicate also filed. July 7th, 1858, H. received and recorded a sheriff's deed. November 15th, 1861, P., the assignee of R.'s certificate, received and recorded a sheriff's deed. H. had no actual notice of the sale to R.; H. was in possession under his purchase, and November 6th, 1861, P. sued to recover possession. *Held*, that H. had constructive notice of the prior sale, and that P. was entitled to recover. *Id.*

14. The purchaser of real estate at execution sale has, before the period for redemption expires, a species of equitable conditional estate, which becomes absolute upon the expiration of the time for redemption, leaving thereafter only the barren legal title in the judgment debtor, until the execution and delivery of the sheriff's deed. *Id.*

15. If a plaintiff, in an action of foreclosure, purchases the property at sheriff's sale, he is presumed to buy with full knowledge of all defects in the proceedings relating to service of the summons. *Steinbach v. Leese*, 37 Cal. 297.

16. During the period which elapses between the sale of land on execution and the expiration of the time for redemption, the statute regards the pur-

chaser as the owner in equity of the land, subject only to the right of redemption, and gives him the rents and profits, or the value of the use and occupation—in short, the entire beneficial interest in the property, except the actual possession. *Page v. Rogers*, 31 Cal. 293.

17. The purchaser of real estate sold on execution, upon the delivery to him of the sheriff's certificate of sale, acquires a species of conditional equitable estate in the land, subject to be defeated only by a redemption within the time allowed by law, leaving the legal title, with a right of redemption only in the judgment debtor, which the sheriff may convey to the purchaser by executing a deed to him after the expiration of the period allowed for redemption. *Id.*

19. Under the two hundred and twenty-ninth section of the Practice Act, a subsequent judgment creditor having a lien has a right to redeem real estate sold by foreclosure of a previous mortgage, in the hands of the purchaser. Sec. 229, *Kent & Cahoon v. Laffan*, 2 Cal. 595. This statute is remedial, and should be beneficially construed. *Id.*

20. Without express authority, neither the mayor, nor the commissioner of the funded debt of San Francisco, nor any or either of them, by virtue of their offices, or otherwise, are authorized to redeem, under the act of April 29th, 1851, lands of the city sold on executions against her; neither can the city attorney ratify their act of redemption by plea after suit is brought. *Thorne v. San Francisco*, 4 Cal. 127.

21. The commissioners of the funded debt are not successors in interest, judgment debtors, or judgment creditors, and therefore not redemptioners; nor are they so in their individual capacity of citizens and taxpayers. *Id.*

22. A payment by the sheriff for the redemption of land sold under execution, cannot be made in certified checks. *Id.*

§ 230. *Real property so sold, by whom it may be redeemed.*

Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1st. The judgment debtor, or his successor in interest, in the whole or any part of the property.

2d. A creditor, having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.

Applicable to Justices' Courts.

1. Generally.—The statute allowing a redemption of property sold at judicial sales contemplates that the possession shall not change to the purchaser until the expiration of the time limited for redemption. *Guy v. Middleton*, 5 Cal. 392; *Slout v. Macy*, 22 Id. 647.

2. The statute allowing redemption of lands sold under execution is inoperative as to those cases where the debt, upon which judgment and execution was obtained, was contracted before the passage of the act. *Seale v. Mitchell*, 5 Cal. 401.

3. An act denying a right of sale for the enforcement of the contract would probably be such a vital assault upon the obligation as practically to destroy it, and therefore be unconstitutional. But a repeal of a right of redemption—in other words, an act making a sale absolute instead of conditional—would not impair the contract. *Tuohome Redemption Co. v. Sedgwick*, 15 Cal. 515.

4. The statutory regulations as to redemption are mere provisions of sale, governing the course of the process and its effects. They do not touch the contract of indebtedness, which stands, as it stood before, a valid obligation to pay money, with the sanctions furnished by law for its enforcement. And a sale without any right of redemption is a valid and sufficient remedy for the enforcement of the contract. *Id.*

5. The right to redeem under the statute, and the mode of asserting the right, are mere creatures of the statute. The right is given to a judgment creditor, and if before a party becomes a judgment creditor the law be repealed, he has no claim to redeem, because he does not belong to the class of persons for which the remedy is furnished. *Id.*

6. The Legislature may give a particular privilege, or a right, to contract on certain terms or in certain circumstances, but it may repeal the provision, or deny the right, as a general rule, as fully and completely as it can give them; or it may alter the terms at its pleasure, subject only to this, that it cannot repeal or alter so as to affect those contracts which have been made during the existence of the act authorizing them. *Id.*

7. The right to redeem land is no part of the contract of indebtedness. It is a new privilege given by statute. It is a provision made by statute for a future contract, by pursuing which a purchase of land may be made. But as this provision is only a matter out of which rights may grow, the provision may be repealed at any time before a party avails himself of it. *Id.*

8. A redemption of property sold under a decree of foreclosure is accomplished by payment under protest, if the amount claimed to be due by the sheriff to certain portions claimed are disputed. *Id.*

9. The statutory right of redemption is equally applicable to sales under decrees in mortgage cases, as to sales under ordinary judgments at law. *McMillan v. Richards*, 9 Cal. 365.

10. Courts of equity will lean in favor of the right of redemption. *Ellicks v. Lowe*, 10 Cal. 207.

11. A party entitled to redeem has a right to have ascertained the price at which his interest was sold, in order that he may redeem. *Rawn v. Reynolds*; 11 Cal. 20.

12. The equitable right to redeem property sold under a decree of foreclosure held by subsequent incumbrancers is merged into a statutory right, not by any force given to the language of the decree, but by the fact that they have had their day in Court, and an opportunity of setting up any equities they possessed. After the decree, they stand, as to their right of redemption, in the same position as ordinary judgment debtors. *Montgomery v. Tutt*, 11 Cal. 317.

13. In a suit to foreclose a mortgage, K., a junior mortgagee of the premises, was made a party, and in accordance with the prayer of his answer, the decree declared the amount of his lien, and ordered the application of any proceeds of the sale remaining after satisfaction of the prior mortgage to be applied to its payment. The premises were sold under the decree to F. for an amount more than sufficient to satisfy the first mortgage, and the surplus was paid to K., but leaving the larger portion of his claim unsatisfied. This balance was assigned by K. to G. and B., who, within the six months, tendered the sheriff the amount required by statute to redeem from the sale. Held, that G. and B. were redemptioners under the statute, and that F. was not entitled to the sheriff's deed. *Frank v. Murphy*, 21 Cal. 108.

14. The holders of the others, secured by the mortgage, have a right to redeem from the sale made under such foreclosure, but when not made parties to the action must assert this right to redeem within four years, or it is barred by the Statute of Limitations. *Grattan v. Wiggins*, 23 Cal. 16.

15. The right to foreclose and the right to redeem are reciprocal, and the Statute of Limitations as to the right of redemption begins to run at the time the right of action accrues on the mortgage. *Id.*

16. The obligation of a judgment creditor or redemptioner, to pay a certain amount of money in order to exercise the statutory right of redemption from a sale of land made by a sheriff, is a debt within the meaning of the Act of Congress making treasury notes lawful money and a legal tender in payment of debts. *People v. Mayhew*, 26 Cal. 655.

17. Who may or may not redeem.—Under the two hundred and twenty-ninth section of the Practice Act, a subsequent judgment creditor, having a lien, has a right to redeem real estate sold by foreclosure of a previous mortgage in the hands of the purchaser. *Kent & Cahoon v. Laffan*, 2 Cal. 595.

18. It follows that a creditor of the mortgagor obtaining a judgment after sale under the decree of foreclosure, but before the execution of the conveyance thereunder, acquires a lien on the estate entitling him to redeem. *McMillan v. Richards*, 9 Cal. 365.

19. Where a mechanic's lien attached on certain premises January 18th, 1856, and a mortgage was placed on the same premises January 21st, 1856, and a suit was brought subsequent to the execution and record of the mortgage to enforce the mechanic's lien, in which suit the mortgagees were not made parties, and under the decree rendered in such suit a sale was made, and after the expiration of six months no redemption being had, a deed was executed to the assignees of the sheriff's certificate: *Held*, that the right of the mortgagees to redeem the premises, by paying off the incumbrance of the mechanic's lien, was not affected by the decree and the proceedings thereunder, and that the purchasers of the premises upon a decree of foreclosure of the mortgage, having received this deed upon such purchase, was entitled to the same right to redeem. *Whitney v. Higgins*, 10 Cal. 547.

20. The right to redeem under the statute, from a sale on execution, exists in some instances where there is no equity, and in other instances in connection with the equitable right. Parties to the suit in which the judgment is rendered, under which the sale is made, are restricted to the six months given by statute. Parties acquiring interests pending suits to enforce previously existing liens, or after judgment docketed or sale made, have no equity, and are confined to the rights given by the statute; but parties obtaining interests subsequent to the plaintiff and before suit brought, who are made parties in such suit, possess the equitable and statutory right. They may redeem under this statute, or they may file their bill in equity. *Id.*

21. The redemption should be beneficially construed. *Kent v. Laffan*, 2 Cal. 595.

22. The fact that judgments were recovered before the act of 1859, does not vest in the holders of them the right to redeem from a sale made after the passage of the act, upon any terms different from those prescribed by the act. If the right to redeem under the act of 1851 were an incident to any judgment rendered while that act existed, it was a portion of the remedy which might be taken away by the Legislature at any time before the right had become vested by the party availing himself of it. *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515.

23. Where plaintiffs, owners of certain judgments and decrees, had both the equitable and statutory right to redeem property sold, and exercised their right under the statute by redeeming from D., who had purchased under his own foreclosure, and then D., as assignee of other judgments, redeemed from plaintiffs: *Held*, that plaintiffs did not lose their equitable right of redemption, from the fact that they also asserted their statutory right, the subsequent redemption by D. leaving their claims unsatisfied. *Id.*

24. The doctrine of *Whitney v. Higgins*, (10 Cal. 554), as to equitable right of redemption in favor of certain persons not made parties to a mortgage foreclosure, applied to a peculiar state of facts. *Id.*

25. Without express authority, neither the mayor nor the commissioners of the funded debt of San Francisco, nor any or either of them, by virtue of their offices or otherwise, are authorized to redeem, under the act of April 29th, 1851, lands of the city sold under executions against her; neither can the city attorney ratify their act of redemption by plea after suit brought. *Thorne v. San Francisco*, 4 Cal. 127.

26. The commissioners of the funded debt are not successors in interest, judgment debtors, or judgment creditors, and therefore not redemptioners, nor are they so in their individual capacity of citizens and tax-payers. *Id.*

27. A payment to the sheriff for the redemption of land sold under execution cannot be made in certified checks. *Id.*

28. The purchaser at an execution sale, before conveyance to him, has a right

to redeem the property sold on the enforcement of a prior lien; after conveyance to him, he has the same right as successor in interest to the debtor or mortgagor. *McMillan v. Richards*, 9 Cal. 413.

29. Possibly a Court of equity would, under some circumstances, allow a tenant for years to redeem the premises sold in foreclosure, if he applied within a reasonable period after becoming acquainted with the proceedings. *McDermott v. Burke*, 16 Cal. 590.

30. A. owes B. a debt; to secure it A. and C. jointly mortgage to B. a piece of land owned by them in common. Subsequently, A. mortgages his undivided interest in the land to secure a debt to D. B. forecloses against A. and C., and buys in the whole land, not making D. a party. The time of statutory redemption having expired, B. gets a sheriff's deed. *Held*, that D., as subsequent mortgagee, may redeem A.'s but not C.'s interest in the land, and that the sale is final as to C.'s interest, D. not being a necessary party to the foreclosure. *Kirkham v. Dupont*, 14 Cal. 563.

31. A subsequent mortgagee would have a right to redeem premises from a sale under a judgment upon mechanics' liens by paying the money justly due, interest, costs, etc., he not having been party to the suit by the lienholder. *Gamble v. Voll*, 15 Cal. 510.

32. A mortgagor may, in this State, maintain an action to redeem the mortgage. *Daubenspeck v. Platt*, 22 Cal. 330.

§ 231. ¹When it may be redeemed, and redemption money.

The judgment debtor or redemptioner, may redeem the property from the purchaser within six months after the sale, on paying the purchaser the amount of his purchase, with with twelve per cent. thereon in addition, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase and interest on such amount; and if the purchaser be also a creditor having a prior lien to that of the redemptioner other than the judgment under which such purchase was made, the amount of such lien with interest.

¹Amended 1859, 139; 1860, 302, applicable to Justices Courts; see also, preceding section.

1. When a redemptioner, under the statute, pays to the sheriff an excess of money, under protest as to the excess, the payment is not compulsory. *McMillan v. Vischer*, 14 Cal. 235.

2. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages, with the costs, do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. *Id.*

3. The purchaser at an execution sale, before conveyance to him, has a right to redeem the property sold on the enforcement of a prior lien; after conveyance, he has the same right as successor in interest to the debtor or mortgagor. *Id.*

4. Nor is he required to pay interest on the whole judgment of the purchaser, but only on the excess over and above the bid. *McMillan v. Vischer*, 14 Cal. 232.

5. A. owes B. a debt; to secure it, A. and C. jointly mortgage to B. a piece of land owned by them in common. Subsequently, A. mortgages his undivided interest in the land to secure a debt to D. B. forecloses against A. and C., and buys in the whole land, not making D. a party. The time for statutory redemption having expired, B. gets a sheriff's deed: *Held*, that D., as subsequent mortgagee, may redeem A.'s, but not C.'s, interest in the land,

and that the sale is final as to C.'s interest, D. not being a necessary party to the foreclosure. *Kirkham v. Dupont*, 14 Cal. 559.

6. The redemption money for A.'s interest would be the amount of B.'s mortgage debt, with interest, etc., less one-half of the purchase money of the whole tract sold, as the land of A. and C. under the foreclosure sale. *Id.*

7. In such case the sheriff is the bailee of the redemptioner as to the excess, who may recover it back on demand, the money not having been paid over to the redemptioner. *McMillan v. Vischer*, 14 Cal. 232.

8. The legal estate exists in the judgment debtor after expiration of the time to redeem, until execution of the conveyance to the purchaser. *McMillan v. Richards*, 9 Cal. 365.

9. The title to real estate does not pass until the execution and delivery of the deed. *Anthony v. Wessel*, 9 Cal. 103.

10. Time is not given for the purpose of enabling the debtor to make a profit out of the estate, but for the purpose of enabling him to raise the money to redeem. *Harris v. Reynolds*, 13 Cal. 517.

11. Where a redemptioner, under the statute, pays to the sheriff an excess of money, under protest as to the excess, the payment is not compulsory. *McMillan v. Vischer*, 14 Cal. 240.

12. Under our statute a redemptioner is not required to pay interest on the purchaser's bid, over and above the eighteen per cent., (now twelve per cent.) nor is he required to pay interest on the whole judgment of the purchaser, but only on the excess over and above the bid. *Id.*

13. A party entitled to redeem has a right to have ascertained the price at which his interest was sold, in order that he may redeem. *Raus v. Reynolds*, 11 Cal. 14.

14. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. *McMillan v. Vischer*, 14 Cal. 240.

15. Months.—The term "months" used in the statute fixing the period of redemption from judicial sales, means calendar and not lunar months. *Gross v. Fowler*, 21 Cal. 392.

16. A sheriff's deed.—Upon a judicial sale, executed before the expiration of the statutory period of redemption, is absolutely void and not merely voidable. *Grass v. Fowler*, 21 Cal. 392; *S. & L. Society v. Thompson*, 32 Id. 347.

17. A deed executed by a sheriff immediately after the sale, without waiting the expiration of the time given by law for redemption, is void. An entry under such deed is not an entry under color of title. *Bernal v. Gleim*, Oct. T. 1867.

18. Who may or not object to the redemption.—Where a party purchased property at sheriff's sale, and on attempt by the owner to redeem from him he objects that the amount tendered for redemption is not enough, because not including certain taxes he has paid on the property: *Held*, that he must show that the taxes were legally assessed and paid, and were a charge on the property before or at the time of the redemption, and the tax collector's receipts are not sufficient proof. *Seale v. Doane*, 17 Cal. 476.

19. Third persons have no right to inquire from what source a redemptioner gets the money he proposes to use to effect a redemption he is entitled to make. *Id.*

§ 282. ¹ When judgment debtor, or other redemptioner, may redeem.

If property be so redeemed by a redemptioner, either the judgment debtor or another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemp-

tion, with four per cent. thereon in addition, and the amount of any assessment or taxes which the said last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition the amount of any liens held by said last redemptioner prior to his own, with interest; *provided*, that the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as the debtor or a redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, with four per cent. thereon in addition, and the amount of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the said last redemptioner previous to his own, with interest. Notice of redemption shall be given to the Sheriff; if no redemption be made within six months after the sale, the purchaser, or his assignee, shall be entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made and notice thereof given, the time for redemption shall have expired, and the last redemptioner or his assignee, shall be entitled to a Sheriff's deed.* If the debtor redeem at any time before the time for redemption expires, the effect of the sale shall be terminated and he be restored to his estate.

Amended 1859, 140; 1860, 302. Applicable to Justices' Courts.

*STATUTES OF 1858, 95.

An Act for the relief of purchasers at sales of real estate by public officers. Approved, March 27th, 1858.

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Where lands have been or may hereafter be sold by a sheriff, or other authorized officer, for taxes, or under an execution or order of sale, and the purchaser or his assigns may be entitled to a deed, and the sheriff, or other officer who made the sale, is dead or absent from the State, or in any wise disqualified, it shall or may be lawful for the successor of the said sheriff or other officer, to make such deed to such purchaser, his assigns or assignees, in the same manner and with the same effect as if made by the officer making such sale.

SEC. 2. When property has heretofore been sold by a sheriff, or other authorized officer, for taxes, or under an execution or order of sale, and in consequence of the death, absence from the State, or other disqualification of the sheriff, or other officer who made the sale, a deed for the property so sold has been executed to the purchaser or purchasers, or to his or their assigns, by the successor of such sheriff, or other officer, such deed so made, as aforesaid, by the successor of the officer who made the sale, is hereby ratified and confirmed, and made as valid and binding, to convey the property, as though the same had been executed by the officer himself who made the sale; and such deed, so made, and executed, and acknowledged, according to law, and heretofore recorded, shall impart notice of its contents from and after the date of the passage of this Act.

SEC. 3. Such deeds, so made as aforesaid, shall have the same force and effect as evidence as if made by the officer making such sale.

1. A sheriff who sells land under execution, and gives a certificate of the sale to the purchaser, and subsequently his term of office expires, is the proper person to make the deed. *Anthony v. Wessel*, 9 Cal. 103.

2. A purchaser at a sheriff's sale may have a lien upon the property prior to that of the redemptioner. The fact that he is the creditor does not divest the lien. He may be both a creditor and a purchaser, and still have a prior lien to that of the redemptioner. This can only be on the principle that the legal estate is still in the judgment debtor, until the delivery of the sheriff's deed. *Knight v. Fair*, 9 Cal. 117.

3. The Redemption Act of 1859 is in substitution of the Act of 1851, and applies to sales made after the passage of the Act of 1859, though made upon judgments rendered before. *Tuohamne Redemption Co. v. Sedgwick*, 15 Cal. 515.

4. The payment by a judgment debtor of the judgment, after a sheriff's sale, extinguishes the lien, and the fact that he takes a transfer of the certificate and the sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. *McCarthy v. Christie*, 13 Cal. 81.

5. Where plaintiffs, owners of certain judgments and decrees, had both the equitable and statutory right to redeem property sold, and exercised their right under the statute by redeeming from D., who had purchased under his own foreclosure, and then D., as assignee of other judgments, redeemed from plaintiffs: Held, that plaintiffs did not lose their equitable right of redemption from the fact that they also asserted their statutory right, the subsequent redemption by D. leaving their claims unsatisfied. *Tuohamne Redemption Co. v. Sedgwick*, 15 Cal. 522.

6. A sheriff's deputy may execute a deed for property sold under execution, but he must execute it in the name of the sheriff. If executed in his own name, it is decisive against the party claiming under it. *Lewis v. Thompson*, 3 Cal. 266.

7. A *writ of mandamus* will not lie against a sheriff to compel him to make a deed to land to a purchaser at execution sale who refuses to pay the purchase money, for the reason that he is the oldest judgment and execution creditor, and entitled to the money, especially when there is an unsettled contest as to the question of lien. *Williams v. Smith*, 6 Cal. 91.

8. Where a sheriff's deed is executed by a deputy, in the name of the sheriff whose term of office had expired at the time of the execution of the deed, the authority of the deputy must be shown to authorize such deed to be read in evidence in an action of ejectment. *Cloud v. El Dorado County*, 12 Cal. 128.

9. The sheriff's deed, executed under a judicial sale for taxes, is not *prima facie* or conclusive evidence of his power to sell. But his power to sell, to recite a sale in his deed, and to make the deed, must be proved by the judgment and execution. *People v. Doe*, 31 Cal. 220.

10. A deputy sheriff may, after the expiration of the term of office of his principal, and in the absence of the latter from the State, execute a deed to the purchaser, at a judicial sale, made by the sheriff while in office. The authority of the deputy is not impaired by the act of 1859, allowing the deed in such cases to be executed by the succeeding sheriff. *Mills v. Sulley*, 22 Cal. 373.

11. The officer who makes a sale of land by virtue of an execution, and executes to the purchaser a deed therefor, must in his deed make recitals of the recovery of the judgment, the names of the judgment creditor or creditors, and of the judgment debtor or debtors, and of the issuing of an execution on the judgment, and of the levy and sale thereunder. The recital of such facts is essential to show the officer's authority, and the transmission of the debtor's title in the property to the purchaser. *Donahue v. McNulty et al.*, 24 Cal. 411.

12. A sheriff's deed under a judicial sale, executed before the expiration of the statutory period of redemption, is absolutely void, and not merely voidable. *Gross v. Fowler*, 21 Cal. 392. See preceding section.

§ 233. ¹In cases of redemption, to whom the payments are to be made.

The payments mentioned in the last two sections may be

made to the purchaser or redemptioner, as the case may be, or for him, to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, said payments shall be made in the same kind of money or currency, and a tender of the money shall be equivalent to payment.

'Amended 1863, 690. Applicable to Justices' Courts.

1. Where a redemptioner under the statute pays to the sheriff an excess of money under protest as to the excess, the payment is not compulsory. *McMillan v. Fischer*, 14 Cal. 232.

2. In such case the sheriff is the bailee of the redemptioner as to the excess, who may recover it back on demand, the money not having been paid over to the redemptioner. *Id.*

3. A payment to the sheriff for the redemption of land sold under execution cannot be made in certified checks. *People v. Hays*, 4 Cal. 127.

4. The "officer who made the sale" refers to the incumbent at the time of the acts of sale, and not to the official character of the person; and if he be dead his successor cannot perform the duty—i. e., receive the redemption money. *People v. Boring*, 8 Cal. 406; *Anthony v. Wessel*, 9 Id. 103.

5. How redemption money in such cases is to be paid, discussed. *Id.*

6. The title to redeem does not arise from the existence of the facts mentioned in the statute, but it is a statutory right, given only in the event of a tender and production of certain statutory proofs. The redemptioner must produce a copy of the docket of the judgment. *Haskell v. Manlove*, 14 Cal. 54.

7. The effect of a sheriff's certificate of sale of land is spent when the defendant in the judgment pays the holder of the certificate the amount of the purchase and interest. *Baber v. McLellan*, 30 Cal. 135.

8. Land sold at sheriff's sale under a judgment, payable generally in money, without specifying a particular kind of money, may be redeemed with treasury notes, made a legal tender by Act of Congress. *People v. Mayhew*, 26 Cal. 655.

9. The sheriff is the special agent of the purchaser of land, authorized to receive the redemption money for him, and as such may receive in redemption what is regarded as current money at the time and place, though not strictly a legal tender, unless the judgment under which the sale was made was rendered payable in a particular kind of money. *People v. Mayhew*, 26 Cal. 655.

§ 234. What a redemptioner must do in order to redeem.

A redemptioner shall produce to the officer or person from whom he seeks to redeem, and serve with his notice to the sheriff:

1st. A copy of the docket of the judgment under which he claims the right to redeem, certified by the Clerk of the Court, or of the county where the judgment is docketed; or if he redeem upon a mortgage or other lien, a note of the record thereof certified by the recorder:

2d. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto: and

3d. An affidavit by himself or his agent, showing the amount then actually due on the lien.

Applicable to Justices' Court.

1. If a party claim a sheriff's deed, as having redeemed property as successor in interest of the judgment debtor, his offer to redeem must have been made in that character. *Haskell v. Manlove*, 14 Cal. 54.

2. To entitle a judgment creditor having a lien to redeem, he must serve upon the officer a copy of the docket of the judgment. A copy of the judgment is not sufficient. *Id.*

3. A certificate of the sheriff of the purchase of property as that of the defendant in execution is not sufficient to enable the holder to redeem as such successor, at least, not until the expiration of the six months. *Id.*

4. An assignee of a judgment and of the sheriff's certificate of a sale thereunder stands in the same position as his assignor, the plaintiff, after the judgment has been reversed; and the sale will be set aside and the property restored to the defendant, where no loss or injury will be done thereby.

An Act to amend an Act entitled "An Act to regulate proceedings in civil cases in the Courts of Justice in this State," passed April 29th, 1851. The People of the State of California, represented in Senate and Assembly, do enact as follows:

Sec. 1.—Section two hundred and thirty six of said Act is hereby amended so as to read as follows:

§ 236.—The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof, *provided, that when any rents or profits have been received by the Judgment Creditor, or Purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and provided, further, that if the redemptioner before the expiration of the time allowed for such redemption, shall make demand in writing of such purchaser or creditor, or his or their assigns, for a written and verified*

statement of the amounts of such rents and profits thus received, the period for redemption shall be extended five days after such sworn statement shall be given by such purchaser or his assigns, to such redemptioner; and provided, further, that if such purchaser or his assigns shall for a period of one month from and after such demand fail or refuse to give such statement, such redemptioner may bring an action in any Court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption shall be extended to such redemptioner.

Sec. 2.—This Act shall take effect immediately. [Approved March 1st, 1870.]

value of the use and occupation thereof.

Applicable to Justices' Courts.

made to the purchaser or redemptioner, as the case may be, or for him, to the officer who made the sale. When the judgment under which the sale has been made is payable a specified kind of money or currency, said payments shall be made in the same kind of money or currency, and a tender of the money shall be equivalent to payment.

¹Amended 1863, 690. Applicable to Justices' Courts.

1. Where a redemptioner under the statute pays to the sheriff an excess money under protest as to the excess, the payment is not compulsory. *Millan v. Vischer*, 14 Cal. 232.

2. In such case the sheriff is the bailee of the redemptioner as to the excess, who may recover it back on demand, the money not having been paid over to the redemptioner. *Id.*

3. A payment to the sheriff for the redemption of land sold under execution

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witness thereto: and

3d. An affidavit by himself or his agent, showing the amount then actually due on the lien.

Applicable to Justices' Court.

1. If a party claim a sheriff's deed, as having redeemed property as successor in interest of the judgment debtor, his offer to redeem must have been made in that character. *Haskell v. Manlove*, 14 Cal. 54.

2. To entitle a judgment creditor having a lien to redeem, he must serve upon the officer a copy of the docket of the judgment. A copy of the judgment is not sufficient. *Id.*

3. A certificate of the sheriff of the purchase of property as that of the defendant in execution is not sufficient to enable the holder to redeem as such successor, at least, not until the expiration of the six months. *Id.*

4. An assignee of a judgment and of the sheriff's certificate of a sale thereunder stands in the same position as his assignor, the plaintiff, after the judgment has been reversed; and the sale will be set aside and the property returned to the defendant, where no loss or injury will be done the assignee. *Arnolds v. Harris*, 14 Cal. 687.

5. Otherwise, as to a stranger, a *bona fide* purchaser without notice. He is not within the rule. But to constitute himself such a purchaser, he must show that he has paid the purchase money, and also that he is the purchaser of the legal title, not of a mere equity. And a purchaser at execution sale is clothed with the legal title until he receives a sheriff's deed. *Id.*

§ 235. *Until the expiration of redemption time, Court may restrain waste on the property; what shall be considered waste.*

Until the expiration of the time allowed for redemption, the Court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it shall not be deemed waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family, while he occupies the property.

Applicable to Justices' Courts.

§ 236. *Rents and profits, who is to receive.*

The purchaser from the time of the sale until a redemption and a redemptioner, from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof.

Applicable to Justices' Courts.

1. The purchaser at sheriff's sale of a "water ditch" is entitled to the rents and profits thereof from the date of the sale till the expiration of the time for redemption, as well from the judgment debtor in possession as from his tenant. *Harris v. Reynolds*, 13 Cal. 514.

2. The words "tenant in possession," in section two hundred and thirty-six of the Practice Act, embrace the judgment debtor, as well as his lessee. *Id.*

3. Where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant: *Held*, that the purchaser, under the mortgage sale, can require the tenant to pay the rent over again to him. *McDevitt v. Sullivan*, 8 Cal. 592.

4. A party in possession of premises under sheriff's sale, and receiving rents and profits during the time for redemption, should, in equity, as between him and defendant in execution, pay the taxes assessed while he is so in possession. If the owner does not pay them, then the statute requires the party in possession to pay. *Kelsey v. Abbott*, 13 Cal. 609.

5. If, in such case, such party fails to pay the tax, permits the premises to be sold, and buys them in, he can derive no benefit from the sale; except that, in equity, the amount paid would probably be considered an advance to the judgment debtor. And this, though the premises were bid in by one of two partners, while the possession under the sheriff's sale was by both partners. The duty to pay the tax was several as well as joint. *Id.*

6. A purchaser of land at sheriff's sale can maintain an action for rent against the tenant in possession under the judgment debtor, before the expiration of the six months allowed for redemption, and as often as the rent becomes due under the terms of the lease existing when he purchased. *Reynolds v. Lathrop*, 7 Cal. 43.

7. The sale operates as an assignment of the lease for the time. *Id.*

8. As to whether the words "tenant in possession" would include the judgment debtor, in a case where he was in possession at the time of the sale, so as to make him responsible for use and occupation—*query?* *Id.*

9. At a sheriff's sale of the premises on a foreclosure suit by plaintiff against B., plaintiff became the purchaser. During the six months succeeding the sale, C., acting as agent of defendants, occupied the premises, carrying on the business of a saloon. At the end of the six months, defendants, as mortgagees, redeemed. *Held*, that the defendants are tenants in possession within the two hundred and thirty-sixth section of the Practice Act, and must pay the plaintiff for use and occupation for the six months. *Knight v. Trest*, 18 Cal. 113.

10. A judgment debtor who redeemed his property within twenty-one days after the sheriff's sale, but who had received from his tenants in possession four hundred and forty-five dollars rent between the day of sale and the redemption: *Held*, liable to the purchaser at the sale for the amount so received. *Kline v. Chase*, 17 Cal. 596.

11. The section of the act allowing to the purchaser the value of the use and occupation affords the only remedy the purchaser is entitled to. *Guy v. Middleton*, 5 Cal. 392.

12. In an action to recover possession of land on a title acquired by a sheriff's sale and a deed thereunder, the plaintiff cannot recover for the rents and profits which have accrued during the six months after the sale allowed for redemption. *Henry v. Everts*, 30 Cal. 425.

13. The right of a purchaser at a sheriff's sale to rents and profits during the time allowed for redemption rests upon the statute; while in ejectment the right to rents and profits rests upon title or the right of possession. *Id.*

14. The purchaser at sheriff's sale of land sold on execution issued on a judgment recovered for taxes, is not entitled to receive the rents and profits during the period allowed for redemption. *Mayo v. Woods*, 31 Cal. 269.

15. After a decree foreclosing a mortgage, the mortgagor in possession is not, until a sale is made under the decree, accountable either for rents or for use and occupation, and is subject to no liability, except that he may be restrained from the commission of waste. *Whitney v. Allen*, 21 Cal. 233.

16. A person who, after the commencement of an action to foreclose a mortgage, acquires possession of the premises from one of the defendants, and con-

times to occupy after a sale under the decree of foreclosure, is a "tenant in possession," and liable as such to the purchasers for the rents and profits accruing between the sale and the executing of the sheriff's deed. *Shores v. Scott River Co.*, 21 Cal. 135.

17. R. having a possessory interest in certain premises, which have been sold under a foreclosure decree, employed M. to manage the property and receive all its proceeds, and pay them over in certain fixed proportions to R. and S. *Held*, that M. was a mere agent of R. and not a "tenant in possession," and, therefore, not liable to the purchaser at the sale for the rents and profits. *Id.*

18. During the period which elapses between the sale of land on execution and the expiration of the time for redemption, the statute regards the purchaser, as the owner in equity of the land, subject only to the right of redemption, and gives him the rents and profits, or the value of the use and occupation—in short, the entire beneficial interest in the property, except the actual possession. *Page v. Rogers*, 31 Cal. 293.

19. Section 236 of Practice Act does not apply to tax sales. *Mayo v. Woods*, Jan. T., 1867.

§ 237. *1If purchaser of real property be evicted for irregularities in the sale, what he may recover and from whom. When judgment to be revived. Petition for the purpose, how and by whom made.*

If the purchaser of real property, sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at Sheriff's sale or his successor in interest, fail to recover possession, in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the Court having jurisdiction thereof shall, on petition of such party in interest, or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon, from the time of payment, at the same rate that the original judgment bore; and when so revived the said judgment shall have the same effect as an original judgment of the said Court of that date, and bearing interest as aforesaid, and any other or after-acquired property, rents, issues, or profits, of the said debtor, shall be liable to levy and sale under execution in satisfaction of such debt; *provided*, that no property of such debtor sold *bona fide* before the filing of such petition, shall be subject to the lien of said judgment; and, *provided* further, that notice of the filing of such petition shall be made by filing a notice thereof in the

Recorder's office of the county where such property may be situated; and that said judgment shall be revived in the name of the original plaintiff or plaintiffs, for the use of said petitioner, the party in interest.

¹Amended 1860, 303. Applicable to Justices' Courts.

1. A purchaser at a sheriff's sale is entitled to a notice of motion to set it aside. Personal service of the notice is not requisite. *Eckstein v. Calderwood*, Jan. T. 1868.

2. The suit of *seire facias* is a remedy unknown to our practice, and cannot be employed for the revival or enforcement of a judgment. *Hamiston v. Smith*, 21 Cal. 129.

3. When the title of a purchaser at a sale in a foreclosure suit fails on account of defect of parties in such suit, he must seek relief by pursuing the course pointed out in *Boggs v. Hargrave*, 16 Cal. 566. *Burton v. Lee*, 21 Cal. 88.

4. The purchaser at sheriff's sale is entitled to notice to set it aside. The fact that he was absent from the State at the time of the sale, or at the time the motion was made, did not excuse the defendants from serving him with a copy of the order to show cause. *Eckstein v. Calderwood*, Jan. T. 1868.

TITLE XXII.

CHAPTER II.—*Proceedings supplementary to execution.*

SECTION 238. When execution returned unsatisfied, judgment creditor may compel judgment debtor to appear before a Judge and answer concerning his property; debtor not to go out of his county.

239. Proceedings to compel debtor to appear; in what cases he may be arrested; what bail may be given.

240. Any debtor of the judgment debtor may pay the latter's creditor.

241. Examination of debtors of judgment debtor, or of those having property belonging to him.

242. Witness required to testify.

243. Judge may order property to be applied on execution.

244. Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.

245. Disobedience of order, how punished.

§ 238. When execution returned unsatisfied, judgment creditor may compel judgment debtor to appear before a Judge and answer concerning his property; debtor not to go out of the county.

When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the Sheriff of the county where he resides; or if he do not reside in this State, to the Sheriff of the county where the judg-

ment roll is filed : is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, shall be entitled to an order from the Judge of the Court, or a county Judge, requiring such judgment debtor to appear and answer concerning his property, before such Judge, or a referee appointed by him, at a time and place specified in the order ; but no judgment debtor shall be required to attend before a Judge or referee out of the county in which he resides, when proceedings are taken under the provisions of this chapter.

N. Y. Code, § 292. Abb. Forms, 1865-1867. Applicable to Justices' Courts.

1. Edwards on Referees, 158, *et seq.*; and Edwards on Receivers in Equity, 366, *et seq.*

2. These proceedings are a substitute for a creditor's bill in the old practice. *Adams v. Hackett*, 7 Cal. 187.

3. The fact that a referee in the proceedings supplementary to execution was the clerk of the attaching creditor, is not any considerable evidence of fraud, when the limited duties of the referee are considered. *Id.*

4. As soon as proceedings supplementary to execution were instituted before the District Court, it obtained jurisdiction over the case, and had authority to proceed and apply the property of the judgment debtor to the satisfaction of the judgment of the plaintiffs. *Id.*

§ 239. *Proceedings to compel debtor to appear ; in what cases he may be arrested ; what bail may be given.*

After the issuing of an execution against property, and upon proof by affidavit, of a party or otherwise, to the satisfaction of the Court, or of a Judge thereof, or County Judge, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such Court or Judge may, by an order require the judgment debtor to appear at a specified time and place before such Judge, or a referee appointed by him, to answer concerning the same ; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the Judge may upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the Sheriff to arrest the debtor and bring him before such Judge. Upon being brought before the Judge, he may be ordered to enter into an undertaking with sufficient surety

that he will attend from time to time before the Judge or referee, as shall be directed during the pendency of proceedings and until the final termination thereof, and will not in the meantime dispose of any portion of his property, not exempt from execution. In default of entering into such undertaking he may be committed to prison.

¹Amended 1854, 90. See N. Y. Code, § 292. Applicable to Justices' Courts.

1. A commitment for contempt, for refusing to obey an order of Court commanding the imprisonment of the party in contempt, until he shall comply with the order, should set forth that it is in the power of the party to comply. *Ex parte Cohen*, 6 Cal. 318.

2. Where the plaintiff proceeded, under section 239 of the Practice Act, to examine his judgment debtor as to a judgment held by him against A., and, after examination, obtained an order to apply the same to the judgment of plaintiff, it seems that it is not necessary to make A. a party to the proceeding. *Id.*

3. Though Courts are exclusive judges of their own contempts, still, a party cannot be imprisoned for neglecting or refusing to do what it appears it is out of his power to perform. *Adams v. Haskell*, 6 Cal. 316.

§ 240. *Any debtor of the judgment debtor may pay the latter's creditor.*

After the issuing of an execution against property, any person indebted to the judgment debtor may pay to the Sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the Sheriff's receipt shall be a sufficient discharge for the amount so paid.

See N. Y. Code, § 293. Applicable to Justices' Courts.

1. B. recovered a judgment against A. and others, and thereafter assigned it for a valuable consideration to C. Subsequent to the assignment, and before notice thereof to the defendants, they paid the amount of the judgment, less \$29 50, to the sheriff, who had served a garnishment upon them in D. v. B. and to a constable on an execution held by him in V. v. B. Action brought by B. against A. and others to recover the amount of his judgment against them. *Held*, that the case did not come under the provisions of the 5th section of the Practice Act, but under section 240, and that as the defendants were not in fact debtors of B., but of C., at the time of the payments, they were not discharged from liability on the judgment against them in favor of B. In order to bring a party within the terms of the 240th section of the Practice Act, there must be a judgment and an execution thereon against property, and the person making the payment must be indebted at the instant to him, against whom the execution runs. *Brown v. Ayres et als.*, Oct. T., 1867.

2. In an action for a malicious prosecution.—The plaintiff, after a verdict in his favor, and before judgment assigned the cause of action and verdict, judgment having been subsequently entered, defendant was garnished under the execution issued on other judgments against the plaintiff, and paid to the sheriff the amount of the judgment in favor of the plaintiff against him, who applied the same upon the executions. *Held*, that the assignment was void, and that the payment by defendant to the sheriff was a satisfaction of the judgment. *Lawrence v. Martin*, 22 Cal. 173.

§ 241. *Examination of debtors of judgment debtor, or of those having property belonging to him.*

After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, or upon proof by affidavit or otherwise, to the satisfaction of the Judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the Judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same.

See N. Y. Code, § 294. Applicable to Justices' Courts. Abb. Forms, 1865-1867.

1. Sections two hundred and forty-one, two hundred and forty-two and two hundred and forty-three of the Practice Act, relating to proceedings supplementary to execution, do not authorize the Court to make an order for the application of property of the judgment debtor in the hands of a third party to the satisfaction of a judgment, upon the mere affidavit of the plaintiff, without first examining the party alleged to have the property in his possession as to the truth of the allegation. The order to apply the property to the satisfaction of the judgment must be based upon the answer of the person alleged to have it in his possession, and such other testimony as may be adduced at the hearing in connection with his answer. The affidavit of the plaintiff merely serves as the basis of a proceeding to acquire jurisdiction of a party who was before a stranger to the action. *Hathaway v. Brady*, 26 Cal. 588.

§ 242. *Witness required to testify.*

Witnesses may be required to appear and testify before the Judge or referee, upon any proceeding under this chapter, in the same manner as upon the trial of an issue.

See N. Y. Code, § 295. Applicable to Justices' Courts.

§ 243. *Judge may order property to be applied on execution.*

The Judge or referee may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except, that the earnings of the debtor for his personal services, at any time within thirty days next preceding the order, shall not be so applied, when it shall be made to appear by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

See N. Y. Code, § 297. Applicable to Justices' Courts. See *Adams v. Hackett* (7 Cal. 202), as to the form of the order in that case.

1. Where the defendant in an action, whose property had been attached by the sheriff, deposited with the sheriff a sum of money, in gold coin, in lieu of

an undertaking to procure a release of the property, and the property was thereupon released, and afterwards, by agreement between the parties to the action, the money was taken from the sheriff and loaned out pending the litigation, and a note drawing interest taken therefor, payable to plaintiff's attorney: *Held*, that after plaintiff recovered judgment, the persons who borrowed the money did not hold it in the character of bailees of the sheriff, but that they were mere debtors, and the money in their hands a mere debt, to be treated as such on proceedings supplementary to execution. *Hathaway v. Brady*, 26 Cal. 586.

2. In proceedings supplementary to execution, the Court has no jurisdiction to make orders relating to persons who are not parties to the proceeding, nor has it power to make an order that one who has, by consent of plaintiff and defendant, borrowed money deposited with the sheriff by defendant to release an attachment, and given his note to a third party therefor, payable when plaintiff recovers judgment, shall pay the money to the plaintiff, when the person who holds the note is not a party to the proceeding, and the note is still in his hands and not under the control of the Court. *Id.*

3. If, pending a litigation to recover a money judgment, gold coin of the defendant, which is in the custody of the sheriff, is, by consent of parties loaned out, and a note of the borrower is taken therefor, payable in gold coin, the Court cannot, after plaintiff recovers judgment, and while the note is outstanding in the hands of third parties, and not under the control of the Court, make an order, in proceedings supplementary to execution, that the borrower pay over the money in gold coin. The mode of enforcing a contract payable in coin is, under the statute, by an action or proceeding upon the contract itself. *Id.*

4. In proceedings supplementary to execution, the Court has power, when it has all parties before it, to appoint a receiver, and order a note in the hands of a third person, a party to the proceeding, and payable to the judgment debtor, or to such third person as trustee of the judgment debtor, to be delivered up to the receiver, to be collected by suit or otherwise under its direction, and the proceeds applied to the payment of the debt. *Id.*

§ 244. *Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.*

If it appear that a person or corporation, alleged to have property of the judgment debtor or indebted to him, claims an interest in the property adverse to him, or denies the debt, the Court or Judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the Court or Judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the Judge granting the same, or the Court in which the action is brought, at any time, upon such terms as may be just.

See N Y. Code, § 299. Applicable to Justices' Courts.

§ 245. *Disobedience of orders, how punished.*

If any person, party or witness, disobey an order of the

referee, properly made, in the proceedings before him under this chapter, he may be punished by the Court or Judge ordering the reference, for a contempt.

See N. Y. Code, § 302. Applicable to Justices' Courts.

1. It is contempt for a party to refuse to obey or answer the writ, on the ground that he is a witness attending on another Court. *Page v. Randall*, 6 Cal. 32.

TITLE XXIII.

ACTIONS IN PARTICULAR CASES.

CHAPTER I.—*Actions for the foreclosure of mortgages.*

SOURCE 246. Proceedings in foreclosure suits.

247. Surplus money to be deposited in Court.

248. Proceedings when debt secured falls due at different times.

§ 246. ¹*Proceedings in foreclosure suits.*

There shall be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action shall be in accordance with the provisions of this chapter. In actions for the foreclosure of mortgages, the Court shall have power, by its judgment, to direct a sale of the encumbered property, (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of the Court and the expenses of the sale, and the amount due to the plaintiff; and if it appear from the Sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment shall then be docketed for such balance against the defendant or defendants personally liable for the debt, and shall then become a lien on the real estate of such judgment debtor, as in other cases on which execution may be issued. No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or

lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, shall be as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to said action, and shall in all respects have the same force and effect.

¹ Amended 1860, 303; 1861, 306; 1866, 704. San Francisco county, see District Court Rules Nos. XXIV, XXV.

1. The provisions of the thirty-second section of the Practice Act do not apply to actions for the foreclosure of mortgages on real estate. *Bowen v. May*, 13 Cal. 348.

2. A foreclosure suit, by our law, results only in a legal ascertainment of the amount due, and a decree directing the sale of the premises for its satisfaction, the surplus, if any, going to subsequent incumbrancers, or the owner of the premises, and execution following for any deficiency. *McMillan v. Richards*, 9 Cal. 365.

3. Complaint.—See § 39, note No. 202.

4. Parties.—Where one of two partners executes a mortgage upon his separate property to secure a debt of the firm, an action to foreclose the mortgage may, after the death of the mortgagor, be maintained against his executor, without any showing by the plaintiff that the partnership is insolvent, or that he has pursued his remedy upon the debt against the surviving partner. *Saving and Loan Society v. Gibb*, 21 Cal. 595.

5. In such action, where the surviving partner is also the executor of the deceased partner, and claims as his devisee an interest in the mortgaged property, there is no misjoinder in making him, as an individual, a co-defendant with himself as executor. *Saving and Loan Society v. Gibb*, 21 Cal. 595.

6. If the real holders of the title are not parties to the decree of foreclosure, a court of equity will allow them to be made such by a supplemental complaint, provided application be made within a reasonable time. *Hayman v. Lovell*, 23 Cal. 106.

7. See further, §§ 6, 12, 13.

8. Suit against executors, etc.—An action may be maintained in the District Court against an executor or administrator, to foreclose a mortgage upon real estate executed by his testator or intestate, although the debt, secured by the mortgage, has been presented as a claim to the executor or administrator and allowed by him, and also by the Probate Judge of the county, where the only object of the action is to reach the property mortgaged and subject it to sale, and have the proceeds applied to the payment of the debt secured, and a judgment is not asked against the general estate of the deceased for the debt or any part of it. *Fallon v. Butler*, 21 Cal. 24. Affirmed, *Pechaud v. Riquet*, 21 Cal. 76.

9. A creditor of the estate of a deceased person, whose debt is secured by mortgage, may, after having presented his claim for allowance to the executor or administrator and Probate Judge, whether it be allowed or rejected, proceed at once to foreclose his mortgage in the District Court. *Willis v. Farley et als.*, 24 Cal. 499.

10. See further, §§ 6, 12, 13.

11. Mortgage payable in instalments.—When a debt secured by mortgage is payable in instalments, the mortgagee or his assignee has a right to bring an action to foreclose the mortgage when the first instalment falls due and is not paid. *Grattan v. Wiggins*, 23 Cal. 16.

12. See post, § 248.

13. **Statute of Limitations, defendant may set up.**—In an action to recover judgment for the amount of the debt secured by mortgage on real estate, and also to foreclose the mortgage, the grantees of the mortgagor, purchasers subsequent to the execution of the mortgage, have a right to plead the statute of limitations as to that part of the claim of plaintiff which asks for a decree foreclosing the mortgage and a sale of the mortgaged premises. *Graffan v. Wiggins*, 23 Cal. 16.

14. A party who, subsequent to the execution of a mortgage, purchases the property from the mortgagor, may avail himself of the statute of limitations as a defense to an action for the foreclosure of the mortgage commenced after the statute has run against the debt secured. *McCarthy v. White*, 21 Cal. 495. See *Lou v. Allen*, 26 Cal. 141, and *Lent v. Shear*, *Id.* 361.

15. **Receiver of rents, etc.**—In a foreclosure suit, the plaintiff has no right to have a receiver of rents and profits of the mortgaged property appointed pending the litigation. *Guy v. Ide*, 6 Cal. 99.

16. **Referee may be appointed to find amount due.**—The usual and best method of proceeding in cases of foreclosure, is to appoint a master, to find and report the amount due, and then exceptions may be filed to the report, upon which the judgment of the Chancellor is given, and this may afterwards be assigned as error. *Guy v. Franklin*, 5 Cal. 416.

17. It is no error for the Chancellor to make the calculations himself; but when he has done so, a mistake in calculation must be brought to his notice in some form analogous to that of an exception to a master's report. *Id.*

18. **What a decree should contain.**—All that a decree in a suit to foreclose a mortgage should contain, is a statement of the amount due to the plaintiffs, a designation of the defendants who are personally liable for the payment of the debt, and a direction that the mortgaged premises, or so much thereof as may be necessary, be sold according to law, and the proceeds applied to the payment of the expenses of sale, the costs of the action and the debt. Nothing further is required. *Leviston v. Swan*, Oct. T. 1867.

19. The omission of the words "be sold" in a judgment of foreclosure, after the description of the premises, is a mere clerical error, which will not affect the judgment. *Moore v. Semple*, 11 Cal. 360; *Abb. Forms*, 198, 200.

[San Francisco county. See Rule XXV as to what a decree should contain.]

20. **Cases relating to the substance of a decree.**—Where A. was indebted to B., to secure which indebtedness the latter held the promissory note of the former, and it was agreed that A. should give a mortgage upon real estate to secure the indebtedness, and that B. should give up and cancel the notes, and waive all claim upon the personal responsibility of A.: *Held*, in an action to foreclose the mortgage, that B. was not entitled to a personal decree against A. for any balance which should remain unpaid after the sale of the mortgaged premises. *Moore v. Reynolds*, 1 Cal. 251.

21. It is error to decree that the sheriff should execute a deed to the purchaser on the foreclosure sale, the land being sold subject to redemption in six months. *Harlan v. Smith*, 6 Cal. 174.

22. In a foreclosure suit the decree will not apportion the debt among the several co-tenants of the land who acquired undivided interests therein at the same time and subsequent to the execution of the mortgage. *Perre v. Castro*, 14 Cal. 531.

23. Where the proceedings in a foreclosure suit were delayed by agreement, in consideration of the execution of a second mortgage on other property in which third parties joined as additional security, and subsequently plaintiff filed a supplemental bill setting up the second mortgage, and asking a sale of the premises described in both mortgages, judgment was taken by default for the debt, and the Court decreed a foreclosure of the several mortgages and a sale of the property conveyed, and directed that the property described in the mortgage executed by Reynolds should be first offered for sale, but that no bid should be received for a less sum than the full amount of judgment and costs; if this sum was not bid, then the whole property included in the two mort-

gages—from Reynolds and from Kirk and Reynolds—was to be sold together: *Held*, that the decree is erroneous. *Rawn v. Reynolds*, 11 Cal. 14.

24. In an action to foreclose a mortgage to recover a debt upon which nothing but the interest was due, the Court below decreed a sale of the property, and directed that the proceeds be applied to the payment of the entire debt; and further decreed, that in case of deficiency of the proceeds, plaintiff recover of defendant the balance and have execution therefor: *Held*, that the latter clause of the decree, giving judgment and execution for the deficiency, must be so modified as to exclude that portion of the debt not due; that as to this the power of the Court, under the statute, was exhausted by decreeing a sale of the property. *Tuggart v. San Antonio Ridge D. and M. Co.*, 18 Cal. 460.

25. A judgment in a foreclosure case adjudged erroneous. See facts. *Van Orden v. Dunham*, April T. 1868.

26. A decree in a foreclosure suit for the sale of the premises, where the mortgagor has transferred his estate in the premises previous to the institution of the suit, and his grantee was not made a party, is void so far as it orders a sale. *Boggs v. Hargrave*, 16 Cal. 559.

27. In an action in the District Court against an administrator to foreclose a mortgage executed by the intestate upon lands belonging to the estate, no judgment can be entered up for any deficiency which may remain after the application of the proceeds of the sale to the mortgage debt. *Pechaud v. Raquet*, 21 Cal. 76.

28. Where defendants claiming adversely are in possession, a decree directing upon the sale (redemption not being made) a conveyance of the fee and a delivery of possession to the purchaser, and conferring upon him, until redemption made, the right to recover the rents, issues and profits of the land, is erroneous. In such case, the decree must be limited to a sale of the rights and interests which the mortgagor possessed at the date of his mortgage, leaving the purchaser to assert his right to the possession, after receiving his conveyance, by the ordinary action of ejectment. *San Francisco v. Landon*, 21 Cal. 589.

29. Personal judgment may be taken.—In this State, parties are at liberty to adopt, in the foreclosure of mortgages, the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises, and the application of the proceeds to its payment, and apply after sale for the ascertainment of any deficiency and execution for the same; or they may take a formal judgment for the amount due in the first instance. *Roseland v. Leiby*, 14 Cal. 156; *Englund v. Lewis et al.*, 25 Cal. 348.

30. Section two hundred and forty-six of the Practice Act authorizes, in foreclosure suits, a personal judgment against the mortgagor, in addition to the relief usually granted, and such personal judgment, when docketed, becomes a lien. But the mere contingent provision for execution, in case of deficiency, etc., does not amount to a personal judgment, and to such provision no effect can be given as a judgment lien until the amount of the deficiency to be recovered has been ascertained and fixed. *Chapin v. Broder*, 16 Cal. 403.

31. A personal judgment is not a lien, until after sale on the decree, etc. See *ante*, § 204, note No. 25.

32. Costs, counsel fees.—A mortgage contained a stipulation for all the costs of foreclosure, including counsel fees not exceeding five per cent. of the amount due. *Held*, that the limitation of five per cent. is intended to apply to counsel fees alone, and that the complainant would be entitled to recover the whole of his costs by operation of the statute, and independent of any stipulation. *Gronfier v. Minturn*, 5 Cal. 492. See *Carriere v. Minturn*, 5 Cal. 435.

33. Relief in case of default.—In a foreclosure suit, where judgment is taken by default, the decree can give no relief beyond that which is demanded in the bill. *Rawn v. Reynolds*, 11 Cal. 14.

34. See further *ante*, §§ 147, 150.

35. **Decree, effect of.**—The foreclosure operates, except in a single instance, only upon the estate or interest which the mortgagor possessed at the time, and the sale under the decree passes, with the like exception, only such estate or interest. The exceptional instances arise where the mortgagor has, subsequent to the execution of the mortgage, acquired a title which enures by way of estoppel to the benefit of the mortgagee. In such case the foreclosure operates upon the subsequently acquired title to the same extent as if originally held by the mortgagor, and the sale under the decree passes it. In all other cases, the estate mortgaged is the only estate brought under the consideration of the Court, and the only estate affected by its decree. *San Francisco v. Landon*, 18 Cal. 465.

36. The decree in an action to close a mortgage concludes the rights of all parties to the action, and the sale under it, consummated by the sheriff's deed, passes as against them, the entire estate held by the mortgagor at the date of the mortgage. The purchaser, as against such parties, is entitled, upon the receipt of his deed, to the possession of the premises, and, if necessary, to the aid of the Court in enforcing its delivery, and his right to this aid is not affected by the fact that pending the action the plaintiff may have executed to one of the parties defendant a conveyance of the whole or a portion of the premises embraced in the decree. *Montgomery v. Middlemass*, 21 Cal. 103.

37. **Death of mortgagor after decree, effect of.**—Where plaintiffs obtained a decree in a foreclosure suit against husband and wife, the mortgage being executed by them, and the decree being in the usual form for the amount due, sale of the premises, application of the proceeds, and execution against the property of the husband for any deficiency, and after the entry of the decree the husband died: *Held*, that the plaintiffs were entitled to an order of sale upon the decree, notwithstanding the death of the husband, but not to execution for any deficiency. *Cowell v. Buckelew*, 14 Cal. 640.

38. Where the mortgagor dies after decree of foreclosure entered, and no administration is had upon his estate, it seems that there is no reason why the execution of the decree should be stayed. The suit is in the nature of a proceeding *in rem*. The decree binds the specific property, and the case is within the reason of the proviso in section 141 of the act concerning the Estates of Deceased Persons. *Nagle v. Macy*, 9 Cal. 426.

39. **Erroneous or defective, or void decree, how relief from granted.**—Courts of equity are ever ready to grant relief from sales made upon their decrees, where there has been irregularity in the proceedings rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree, as when they have been misled by a mistake of fact as to the condition of the property, or the estate sold, provided application be made to them in the suits in which such decrees are entered, within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others. *Goodenow v. Ever*, 16 Cal. 461.

40. Plaintiff must seek relief from the consequences of the invalidity of the decree by proceedings in the foreclosure suit. By his act of purchase he has submitted himself to the jurisdiction of the Court in that suit as to all matters connected with the sale, and is entitled to apply for such relief as the facts of the case may justify. Upon his application, that Court may direct the sale to be set aside and the satisfaction to be canceled; and authorize a supplemental bill for a resale of the premises, to be filed and conducted in the names of the complainants in that suit for the plaintiff's benefit; and direct that the grantee of the mortgagor, and any other persons interested in the premises, be brought in as parties; or it may make such other and different order in the matter as will protect the rights of all parties and mete out exact justice. *Boggs v. Hargrave*, 16 Cal. 559; *Phelan v. Olney*, 6 Id. 478.

41. In a case where, under a decree of foreclosure and sale, H. had come into the possession of the mortgaged premises, and subsequently, on appeal to the Supreme Court, the decree was reversed, with direction that the sale under it be set aside; that defendants in the suit be restored to the property

sold, and that the Court below should proceed to dispose of the case in pursuance of the principles of the opinion. *Rawn v. Reynolds*, 15 Cal. 468.

42. Where the decree is defective is not designating the defendants who are personally liable. The proper remedy in such a case is to move to amend the judgment by supplying the omission. *Leviston v. Swan*, Oct T. 1867.

43. When the title of a purchaser at a sale in a foreclosure suit fails on account of a defect of parties in such suit, he must seek relief by pursuing the course pointed out in *Boggs v. Hargrave*, 16 Cal. 566. *Burton v. Lin*, 21 Cal. 87. See § 12 and § 13.

44. **Execution instead of a decree may issue, when.**—In foreclosure cases, where there is a personal judgment rendered against the defendant, and also a decree in equity awarded, the plaintiff may either issue an execution upon his personal judgment or enforce his decree by sale of the property, but he cannot do both at the same time; and if he issue execution on the personal judgment first, the money realized on it must apply on the judgment, and sale of the property under the decree afterwards made for the balance, and so *vice versa*. *Englund v. Lewis*, 25 Cal. 357.

45. In an action to foreclose a mortgage under our statute, as well since the amendments of 1860 and 1861 as before, a personal judgment for the debt secured may be entered in connection with a decree directing a foreclosure and sale. This judgment cannot, however, be docketed or become a lien on other property, or authorize the issuance of an execution, until after the sale is made and the proceeds applied *pro tanto* to its satisfaction. *Cornerais v. Genella*, 22 Cal. 116.

46. **Equity of redemption.**—The sale of the equity of redemption of mortgaged premises, and assignment of the rents thereof, until foreclosure and sale, to a creditor, cannot operate as a fraud upon the mortgagee, whose rights are secured, and may be enforced by foreclosure. *Dewey v. Latson*, 6 Cal. 609.

47. The equity of redemption of a subsequent incumbrancer, who has been made a party and had his day in Court, is by the decree taken away, leaving only the statutory right. *Montgomery v. Tutt*, 11 Cal. 307.

48. Their equity of redemption from the foreclosure, if not made parties, continues, and they can assert at any time within the period allowed by the Statute of Limitations. *Id*.

49. The estate of a mortgagor and of a judgment debtor after sale stand upon the same footing, and the insertion in the decree of a clause foreclosing the equity of redemption is a useless formula, which cannot enlarge the effect of the decree or any rights of the mortgagee under it. *McMillan v. Richards*, 9 Cal. 365.

50. Possibly a Court of equity would, under some circumstances, allow a tenant for years to redeem the premises sold on foreclosure, if he applied within a reasonable period after becoming acquainted with the proceedings. *McDermott v. Burke*, 16 Cal. 580.

51. It is error to decree that the sheriff should execute a deed to the purchaser on the foreclosure sale, the land sold being subject to redemption in six months. But such an error may be amended without depriving the plaintiff in foreclosure of the benefit of the decree to which he is entitled. *Harlan v. Smith*, 6 Cal. 173.

52. Where it is found by the Court, in an action brought to redeem, "that it was tacitly understood by and between the plaintiff and wife, and the defendant, that the conveyance made by plaintiff to defendant was intended to secure the repayment to said defendant of the sums paid and advanced by him, with interest thereon, and not as an absolute conveyance of the premises, and that upon such payment in gold coin of the United States, said defendant would reconvey said premises to the plaintiff or the plaintiff's wife." The judgment must require the plaintiff to pay the redemption money in gold coin—not under the provisions of the Specific Contract Act, but upon the principle "that he who seeks equity must do equity." *Cowling v. Rogers*, Jan. T. 1868.

53. In an action brought to redeem, no valid objection can be taken to the

judgment in requiring the plaintiff to pay the redemption money within a reasonable time after the entry of the decree. An action of this character is not governed by the provisions of the Practice Act relating to foreclosure of mortgages. It is proper to order that if default be made in the payment of the redemption money, the plaintiff should be barred and foreclosed of all equity of redemption to the premises. This judgment is not made at the time the deed is declared a mortgage, and the grantor is permitted to redeem, but is made after a default in paying the redemption money, and upon motion of the opposite party. *Id.*

54. Proceedings in the nature of a suit to foreclose an equity of redemption held by a subsequent incumbrancer may be maintained by a purchaser under the decree, where such incumbrancer was not made a party to the original suit to enforce the mortgage. Such incumbrancer may be called upon to assert his right by virtue of his lien, and his equity of redemption, extending to the period provided by the Statute of Limitations, be thus reduced to the statutory period of six months. *Goodenow v. Ewer*, 16 Cal. 461.

55. The nature of the mortgagor's right to redeem, and of the mortgagee's right to foreclose, stated. *Id.*

56. A mortgagor may, in this State, maintain an action to redeem the mortgage. *Daubenspeck v. Platt*, 22 Cal. 330.

57. After the execution of a mortgage upon real estate, a judgment was rendered against the mortgagor, which became a lien upon the mortgaged property. The mortgagee then foreclosed the mortgage, making the mortgagor alone a party defendant, had the mortgaged property sold under the decree, became the purchaser, and obtained a sheriff's deed; afterwards the judgment creditor procured an execution upon his judgment, and had the property advertised for sale; the holder of the title under the sheriff's deed filed a bill in equity to enjoin the sale. *Held*, that he was not entitled to an injunction, and that the judgment debtor had a right to sell any interest in the land held by the judgment debtor at the rendition of the judgment or levy of the execution. *Held*, further, that the judgment debtor's equitable right of redemption not having been cut off by the foreclosure, he might, during the two years that his judgment was a lien upon the premises, sell under an execution and purchase the legal title of the mortgagor; and not only that he might assert his right of redemption at any time within the period allowed by the Statute of Limitations, but also he might realize any other benefit or advantage that might accrue to him from the sale. *Alexander et als. v. Greenwood et als.*, 24 Cal. 506.

58. The mortgagee takes no estate in the land mortgaged. He simply has a lien upon it for the security of his demand, which can only be enforced by a judgment for a sale of the property mortgaged and a sale in pursuance of the judgment. The title of the grantee of mortgaged premises is not affected by a foreclosure and sale in a suit commenced after the conveyance by the mortgagor, unless the grantee is made a party to the suit. *Bludworth v. Lake*, Oct. T. 1867.

59. Order of sale, or copy of decree, must issue.—A sheriff has no authority to make sale of mortgaged premises under a judgment of foreclosure and sale, unless an order of sale is issued upon the judgment and placed in his hands. *Heyman v. Babcock*, 30 Cal. 367.

60. If the judgment of a foreclosure gives full directions as to the time, place, terms, and manner of sale of the mortgaged premises, and directs the sheriff to make the sale, a certified copy of the decree is sufficient authority for the sheriff to sell. *Id.*

61. A second order of sale may issue.—If the first order of sale on a foreclosure decree be not executed, a second order may issue. Such second order might in some cases be ground of objection on the score of costs, but it is not objectionable as affecting the validity of the sale. *Shores v. Scott River Water Co.*, 17 Cal. 626.

62. What sheriff must sell.—It is the duty of the sheriff of the county in which any parcel of the mortgaged premises are situated, to execute the order of sale, unless the decree contains special directions in that respect. *Id.*

63. **Sale in parcels.**—The well established rules of equity proceedings require in foreclosure cases, not only that the property should be sold in parcels, but that the property included in the first mortgage should be exhausted before recourse is had to the second. *Raun v. Reynolds*, 11 Cal. 14; *Bancroft's Forms*, 643; *Abb. F.* 132-135.

64. **What property passes by a sale.**—A mortgagor, after the sale of the mortgaged premises under a decree in a suit to foreclose the mortgage, has the right to the use and possession of the mortgaged premises until the execution of the sheriff's deed; but he possesses no right to despoil the property of its fixtures. The deed of the sheriff takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor. *Sands v. Pfeiffer*, 10 Cal. 258.

65. The engine and boilers, etc., used in a flour mill, being permanently fastened to the mill, which had its foundation in the ground: *Held*, to be fixtures covered by a mortgage upon the premises, though put up after the execution of the mortgage; and held to pass to the purchaser of the mortgaged premises under a decree of foreclosure. *Id.*

66. **Writ of assistance.**—A writ of assistance is the appropriate remedy to place the purchaser of mortgaged premises, under a decree of foreclosure, in possession, after he has obtained the sheriff's deed. *Montgomery v. Tidd*, 11 Cal. 190; *Wolf v. Fleischacker*, 5 Id. 244; *Reynolds v. Harris*, 14 Id. 677.

67. Under our system, the order to deliver possession should be first made, unless a direction to that effect is contained in the decree; and if, upon its service, that is disregarded, the Court can at once direct the writ to issue. If delivery of possession to the purchaser is directed by the decree, no preliminary order will be requisite; but upon proof of disobedience to the decree, the party will be entitled, as a matter of course, to the writ, as against the defendant in the suit. *Id.*

68. If a writ of assistance be improperly issued or executed, the Court granting it can, on summary motion, set aside the writ or the service, and restore the possession. *Skinner v. Beatty*, 16 Cal. 156.

69. *Prima facie*, plaintiff in a foreclosure suit is entitled, after sale of the premises and sheriff's deed to him, to a writ of assistance as against the mortgagor and those entering under him subsequent to the decree, if they refuse to surrender possession. *Id.*

70. Where, in such case, a writ of assistance is granted, and the mortgagee and his wife move to set it aside on the ground that they had moved upon and occupied the mortgaged premises as a homestead before the execution of the mortgage by the husband, and continuously ever since, and it appears that the mortgage was given for the purchase money of the premises, the motion must be denied, even though the wife was not a party to the foreclosure. *Id.*

71. L., a married man, purchased certain real estate, subject to a mortgage thereon, which had been previously executed by his grantor, and soon afterwards died. The mortgagee commenced an action to foreclose the mortgage, making the executors of L., but not the widow, a party, and after a decree of foreclosure and sale, and expiration of the time of redemption, received the sheriff's deed (himself being the purchaser), and thereupon applied to the Court for a writ of assistance against the widow, who retained possession of a portion of the premises, which, on demand, she refused to surrender. *Held*, on appeal from an order denying the writ, that the denial was proper; that the estate conveyed to L. became thereby the common property of himself and wife; that upon his death the title to one half of this property vested in her. subject only to the mortgage and the lien for the payment of debts; that this title was not affected by the proceedings in the foreclosure suit to which she was not a party; and that, not being bound by the decree, a writ of assistance could not be issued against her. *Burton v. Lies*, 21 Cal. 87.

72. All that is requisite to obtain a writ of assistance as against the parties and those claiming, with notice, under them, after the commencement of the action, is to furnish to the Court proper evidence of a presentation of the deed to them and a demand of the possession, and their refusal to surrender it. *Montgomery v. Middlemiss*, 21 Cal. 103.

73. The purchaser under a decree of foreclosure of a mortgage is entitled to a writ of assistance, although the decree in the foreclosure action contains no direction to deliver the possession, and although at the time of the application no preliminary order for such delivery of possession had been made by the Court. *Id.*

74. A writ of assistance will not be issued against a purchaser of the mortgaged premises who buys during the pendency of a suit to foreclose, and who is not a party to the suit, without actual or constructive notice of its pendency. *Harkan v. Rackerby*, 24 Cal. 561. (a) A person in possession of land where a writ of restitution is served is presumed to hold under the defendant in the action, and, to avoid being dispossessed by the writ, must show affirmatively that he holds by a right independent and paramount. *Sampson v. Ohleyer*, 22 Cal. 200. (b) Where, pending an action of ejectment against a tenant, the latter transferred the possession to his landlord, who had actual notice of and defended the suit, but was not made a party, and plaintiff recovered the judgment: *Held*, that, under the writ of restitution authorized by the judgment, landlord might be dispossessed. *Id.* (c) In ejectment against the occupant of the premises, a judgment of recovery binds not only the defendant, but all persons who receive possession of the premises from him, with actual notice of the pending suit. *Id.* (d) Persons not parties to a suit in ejectment, and in possession before and at the time it is brought, or those claiming under them, cannot be ousted by the writ of restitution issued upon a judgment therein in favor of the plaintiff. *Id.*

75. Prior to the passage of the Act of May 18th, 1861, Judges of Courts had no power to issue writs of assistance to place the purchaser of property sold under a decree of foreclosure in possession of the same. *Chapman v. Thornburg*, 23 Cal. 43.

76. Upon an application for a writ of assistance, to place a party in possession of land sold by the sheriff under a judgment for taxes rendered by the Justice of the Peace, the applicant must produce in evidence the execution and the judgment, and proceedings upon which the execution issued. *People v. Doe*, 31 Cal. 220.

77. If the Court, in an action to foreclose a mortgage, does not acquire jurisdiction of the person owning the land at the time of the foreclosure, a writ of assistance against the owner or his grantees will be refused. *Steinbach v. Leese*, 27 Cal. 297.

78. See further, § 210, note No. 24.

79. Adverse titles cannot be litigated, but must be saved by the decree.—Adverse titles to the premises held by parties claiming by conveyance from the mortgagor prior to the mortgage, or from third parties prior or subsequent to the mortgage, are not the proper subjects of determination in the suit. Such titles must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance. *San Francisco v. Lawton*, 18 Cal. 465.

80. If any of the parties defendant in an action to foreclose a mortgage claim title to the mortgaged premises, or any portion thereof, adversely to the title mortgaged, their rights under such adverse title should be saved in the decree. *Elias v. Verdugo*, 27 Cal. 420; *San Francisco v. Lawton*, 21 Cal. 589.

81. When a party made defendant in a foreclosure suit, as claiming some interest in the land, sets up, as a full defense, a tax title, he cannot object afterwards that equity has no jurisdiction over tax titles. *Kelsey v. Abbott*, 13 Cal. 609.

82. Title, decree, collaterally attached.—The title of a purchaser, under a sale on a decree of foreclosure, cannot be impeached in a collateral action for irregularity in the proceedings on the sale. *Nagle v. Macy*, 9 Cal. 426.

83. A decree of foreclosure cannot be impeached collaterally because entered prematurely. The remedy is by direct proceeding in the action. *Alderson v. Bell*, 9 Cal. 321; *Nagle v. Macy*, *Id.* 429.

84. In an action of ejectment by a purchaser under a decree, in a suit for foreclosure of a mortgage, to which the mortgagees were parties, against a subsequent lessee of the mortgagees, no question can be raised by the defend-

ant as to the due execution of the mortgage. Of this fact the decree in the foreclosure suit is conclusive. *Hayes v. Shattuck*, 21 Cal. 51.

85. See further, § 144, note No. 68.

86. **Power of sale in mortgage.**—Where a mortgage contains a power of sale, the mortgagee has his election either to foreclose in chancery and obtain a judicial sale, or to sell under the power. *Cormerais v. Genella*, 22 Cal. 116. See post § 260

87. Whether a right of redemption exists after a sale under a power contained in a mortgage. *Query?* *Id.*

88. Where, at a sale under a power contained in a mortgage, the mortgagee becomes the purchaser indirectly by having the mortgaged premises bid in for himself, such sale is not therefore void, but only voidable on the application, in equity, of the mortgagor. The legal title passes by the sale. *Blockley v. Fowler*, 21 Cal. 326.

89. **Caveat emptor, doctrine of.**—The doctrine of *caveat emptor* applies only to sales made upon valid judgments; and is usually invoked with reference to sale upon execution against the general property of a judgment debtor. In such cases, a defect of title is no ground for interference with the sale. *Boggs v. Hargrave*, 16 Cal. 564.

90. A valid decree in a mortgage case operates upon such interest as the mortgagor possessed in the property at the execution of the mortgage. That interest may not constitute a valid title; it may not, in fact, be of any value, and the purchaser takes that risk. To that extent the doctrine of *caveat emptor* applies, even in those cases, and in all cases of adjudication upon specific interests, but no further. The interest specifically subject to sale, whatever it may be worth, a purchaser is entitled to receive; it is for that interest he makes his bid and pays his money. *Id.*

91. **Vendor's lien.**—A vendor has a lien on the land sold for the purchase money, unless he has taken security for its payment, though he has executed the conveyance. *Salmon v. Hoffman*, 2 Cal. 138; *Hill v. Gregory*, 33 Cal. 55.

92. And when the vendor has not conveyed the title, his position is analogous to that of a mortgagee. *Id.*

93. The vendor's lien on the land conveyed is not lost by his taking the notes of the purchaser for the purchase money. And the lien equally exists, whether the instrument amounts to a conveyance or merely to an executory contract. *Walker v. Sedgwick*, 8 Cal. 398.

94. In a bill in equity to enforce the lien, it is not necessary to allege the issuance of execution under a judgment at law previously obtained by the vendor against the purchaser for the amount due, and return of *nulla bona* to sustain the allegation of insolvency. *Id.*

95. A vendor's lien does not exist in this State, where a mortgage security is taken for the purchase money. The silent lien of the vendor is extinguished whenever he manifests an intention to abandon or not to look to it. And this intention is manifested by taking other and independent security upon the same land, or a portion of it, or on other land. *Hunt v. Waterman*, 12 Cal. 301.

96. The lien which the vendor of real property retains, after an absolute conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the property, but a mere equitable right to resort to it upon failure of payment by the vendee. *Sparks v. Hess*, 15 Cal. 186; *Hill v. Gregory*, 33 Cal. 58.

97. The equitable right may be enforced in the first instance, and before the vendor has exhausted his legal remedy against the personal estate of the vendee. The Court, after determining the amount of the lien, can, by its decree, either direct a sale of the property for its satisfaction, and execution for any deficiency, or award an execution in the first place, and a sale only in the event of its return unsatisfied, as the justice of the case may require. *Id.*

98. The execution of two notes for the amount due upon a note and mortgage, when the mortgage is not canceled, will not defeat an action for the foreclosure of the same, commenced after the second notes are due and unpaid. *Creary v. Bowers*, Jan. 1862. [Not reported.]

99. It could not be a defense that only one note was due, as that would be sufficient to show a failure of performance. *Id.*

100. If the mortgage was void, this fact does not invalidate the debt intended to be secured by the mortgage. *Shaver v. Bear River and Auburn Water and Mining Co.*, 10 Cal. 396.

101. The equitable lien which a vendor of real estate, after an absolute conveyance, has for the unpaid purchase money, is waived by the taking of a mortgage to secure the same, although the mortgage is void and cannot be enforced. *Camden v. Vail*, 23 Cal. 633.

102. **Generally.**—If, at the time of the execution and delivery of a promissory note, the payor also gives the payee a bill of sale of personal property by way of mortgage to secure the note, and also deliver possession of the property, the payor has a right to have the property mortgaged applied in satisfaction of the debt; and if the payee sells any of the property, he has a right to have the proceeds or value applied towards the satisfaction of the debt. *McGarvey v. Hall*, 23 Cal. 140.

103. A., the owner of a quartz mill in Amador county, executed a mortgage on the same to B. Afterwards, A. purchased at Sacramento a steam engine and boiler, and, to secure the purchase money, executed to C. a chattel mortgage on the same, and then transported them to Amador and placed them in the quartz mill, so that they became a part of the realty. *Held*, that C.'s mortgage on the steam engine and boiler had priority over the mortgage of B. *Thibbets v. Moore*, 23 Cal. 208.

104. A. commenced an action against B. on a money demand and to foreclose a mortgage given to secure his debt. On motion of A.'s attorney, the prayer for foreclosure of the mortgage and sale of the property was stricken out and a money judgment taken. *Held*, that this was an abandonment and waiver of A.'s right to a foreclosure and sale of the mortgaged property. *Ladd v. Rugles*, 23 Cal. 232.

105. An action can be maintained by the mortgagee of real estate to recover damages for wrongful and fraudulent injuries done to the mortgaged property, by which security of the mortgage has been impaired. *Robinson v. Russell*, 24 Cal. 472.

106. The severance and removal of a house from land covered by a mortgage withdraws the house from the mortgage lien; and after the removal, the mortgagor or his assignee has a right to sell the house, and the purchaser may convert it to his own use. *Buckow v. Swift*, 27 Cal. 434.

107. The five years of limitation within which an execution for an unsatisfied balance on a foreclosure sale may be taken out, from the date when the balance was docketed. *Bowers v. Crary*, 30 Cal. 621.

108. The docketing of a balance remaining due after sale of mortgaged property is not an entry of a new judgment for such balance. *Id.*

§ 247. *Disposition of surplus money after sale.*

If there be surplus money remaining after payment of the amount due on the mortgage, lien, or incumbrance with costs, the Court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in Court.

§ 248. *Proceedings when debt falls due at different times.*

If the debt, for which the mortgage, lien, or incumbrance is held, be not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease: and afterwards as often as more becomes due,

for principal or interest, the Court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

See notes under § 246.

1. When a debt secured is payable in installments, the mortgagee or his assignee has a right to bring an action to foreclose the mortgage, when the first installment falls due and is not paid. *Grattan v. Wiggins*, 23 Cal. 16.

2. Where several notes have been given which are secured by one mortgagee, and the notes are assigned to different persons, and the assignor has a right, by agreement with the assignees, to fix the rights of the purchasers of the several notes to the mortgage security. *Id.*

3. Where, in such a case, the assignee of one note, having the first right to the benefit of the mortgaged security, forecloses when the debt falls due, and obtains a decree under which all the mortgaged property is sold, such foreclosure and sale operate as an extinguishment of the mortgage. *Id.*

4. The holders of the other notes secured by the mortgage have a right to redeem from the sale made under such foreclosure; but when not made, parties to the action must assert this right to redeem within four years, or it is barred by the Statute of Limitations. *Id.*

TITLE XXIV.

CHAPTER II.—*Actions for nuisance, waste and willful trespass, in certain cases, on real property.*

SECTION 249. Nuisance defined, and actions for.

250. Waste, actions for.

251. Trespass for cutting or carrying away trees, etc., actions for.

252. Measure of damages in certain cases under the last section.

253. Damages in actions for forcible entry, etc., may be trebled.

§ 249. *Nuisance defined, and actions for.*

Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment, the nuisance may be enjoined or abated, as well as damages recovered.

Abb. Forms, 573-581

1. **What is Nuisance.**—The fact whether a structure was a public nuisance is a question, not for the Court, but for the jury to decide. *Gunter v. Geary*, 1 Cal. 467. [Affirmed in *People v. Davidson*, 30 Id. 383.]

2. It is a public nuisance to erect a house in a highway. *Id.*

3. A house on fire, or those in the immediate vicinity which serve to communicate the flames, is a nuisance which it is lawful to abate; and the private rights of the individual yield to considerations of general convenience and the interest of society. *Surocco v. Geary*, 3 Cal. 73.

4. The constitutional provision which requires payment for private property taken for public use, does not apply to the destruction of a house to check a conflagration; nor can he who abates this nuisance be made personally liable for trespass, unless the act is done without actual or apparent necessity. *Id.*

5. The erection of a steam engine and machinery and a grist mill in the cellar, under an auction store, held not to be such an injury as to require a restraining power of the Court; at least, not until the question of nuisance should be determined by a jury, and even then the remedy at common law is adequate. *Middleton v. Franklin*, 3 Cal. 241.

6. All that part of a bay or river below low water or low tide is a public highway, common to all citizens, and if any person appropriate it to himself exclusively, the presumption is that it is a detriment to the public. *Gunter v. Geary*, 1 Cal. 462.

7. Where plaintiff's mining claim was overflowed by means of a dam erected by the defendants, the Court ordered a reduction of the dam so as to prevent the overflow, or if necessary, its entire abatement. *Ramsay v. Chandler*, 3 Cal. 90.

8. A ditch to carry off water rightfully flowing to a mining claim is as much a nuisance as a dam to flood it. *Parke v. Kilham*, 8 Cal. 77.

9. A person may construct or continue what would otherwise be an actionable nuisance, provided that at the commencement of it no person was in a condition to be injured by it, or in other words, mere priority, as between owners of the soil, gave a superior right. *Tenney v. Miners' Ditch Co.*, 7 Cal. 339.

10. The diversion of a water-course is a private nuisance. *Tuolumne Water Co. v. Chapman*, 8 Cal. 397.

11. While a ditch by which the waters of a stream have been appropriated is out of repair, and not in condition to carry any water, an action will not lie to abate as a nuisance a reservoir, constructed across the bed of the stream, above the head of the ditch, by which the water of the stream is collected and detained, and caused to flow unequally. *Bear River and A. W. & M. Co. v. Boes et als.*, 24 Cal. 359.

12. It does not follow as a legal conclusion that a wharf erected below high water mark in tide waters, and upon the soil thereunder belonging to the State, is a public nuisance, or an injury to commerce and navigation. Whether such a wharf is a public nuisance is a question of facts. *People v. Davidson*, 30 Cal. 379.

13. **Jurisdiction of actions concerning nuisances.**—The statute of this State, defining what are nuisances, and prescribing a remedy by action, does not take away any common law remedy in the abatement of the nuisances which the statute does not embrace. *Stiles v. Laird*, 5 Cal. 122.

14. The District Courts have constitutional jurisdiction of cases of nuisances. The grant of such jurisdiction by statute to the County Courts cannot take away the constitutional jurisdiction of the District Courts. *Fitzgerald v. Urton*, 4 Cal., 235; *Courtwright v. B. R. A. Ward M. Co.*, 30 Cal. 573.

15. **Actions to abate nuisances, parties, etc.**—A common nuisance being deemed an injury to the whole community, every person in the community is supposed to be aggrieved by it, and has the right to abate it without regard to the question whether it is an immediate obstruction or injury to him. A private nuisance is one which only injures a particular individual or class of individuals, and can be abated only by him who suffers from it. *Gunter v. Geary*, 1 Cal. 462.

16. Actions for the diversion of the waters of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *Parke v. Kilham*, 8 Cal. 77.

17. To entitle a party to an injunction in a case of a nuisance, the injury to be restrained must be irremediable, and such as cannot be adequately compensated by damages. *Middleton v. Franklin*, 3 Cal. 241.

18. In an action to abate a nuisance damages are only an incident to the action, and the failure to recover them does not affect the question of costs. *Hudson v. Doyle*, 6 Cal. 102. Affirmed in *Courtwright v. B. R. A. W. M. Co.*, 30 Id. 578.

19. In action of nuisance or trespass the defendant has no right to inquire into the good faith of the plaintiff's possession. *Eberhard v. Tuolumne Water Co.*, 4 Cal. 308.

20. In an action to abate a nuisance caused by the running a ditch for the conveyance of water across the land of the plaintiff, the defendants set up in the answer that it was mineral land belonging to the United States, and that the ditch was for mining purposes, which allegations were stricken out on motion of plaintiff's attorney. Held, that they were properly stricken out as irrelevant; for if true, they constituted no defense to the action. *Weimer v. Lowery*, 11 Cal. 112.

21. Plaintiffs owned certain mining claims and quartz lode, on the banks of a stream above the mill and dam of defendant. Defendant commenced raising his dam two feet higher. Plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water on to plaintiff's claims, and thus prevent them from working them, and would also destroy their water privilege for a quartz mill which they intended to construct. Held, that the action was premature, and that the demurrer to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained. *Harvey v. Chilton*, 11 Cal. 120.

22. An action to abate a nuisance in a highway, by water obstructing the free use of plaintiff's property, will lie the same as to abate a nuisance in a highway by land. *Blanc v. Klumpke*, 29 Cal. 156.

23. If a nuisance in a highway only affect the plaintiff, in common with the public at large, in the use of the highway, he cannot have his private action; but if the free use of his private property is interfered with by such nuisance, he may have his private action to abate the same. *Id.*

24. In an action to abate a nuisance, a general verdict in favor of the plaintiff is sufficient to sustain a judgment abating the same. *Blood v. Light*, 31 Cal. 115.

25. In an action to abate a nuisance, where the jury render verdict in favor of plaintiff, and also return special findings not inconsistent with the general verdict, a judgment abating the nuisance will be sustained. *Id.*

§ 250. Waste, actions for.

If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

Abb. Forms, 582-588 and 1768.

1. At common law there is no forfeiture of an estate for years for the commission of waste, but it was made so by the statute of 6 Edward I, and it was expressly confined to the place wherein the waste was committed; but the statute of California confines the remedy to triple damages. *Chipman v. Emeric*, 3 Cal. 283.

2. In an action for waste, when triple damages are given by statute, the

demand for such damages must be expressly inserted in the declaration, which must either cite the statute, or conclude to the damage of the plaintiff against the form of the statute. *Id.*, 5 Cal. 239.

3. Injunctions to restrain injuries in the nature of waste should not be issued before the hearing of the merits, except in cases of urgent necessity, or when the subject matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. But in all cases where the right is doubtful, the Court should direct a trial at law, and in the meantime grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief. *Hicks v. Michael*, 15 Cal. 116.

4. On application for injunction to restrain waste or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all matters in controversy, including questions of title. *Id.*

§ 251. *Trespass for cutting or carrying away trees, etc., actions for.*

Any person who shall cut down, or carry off, any wood or underwood, tree or timber, or girdle or otherwise injure any tree or timber on the land of another person, or on the street or highway in front of any person's house, village or city lot, or cultivated grounds; or on the commons or public grounds, of any city or town; or on the street or highway, in front thereof, without lawful authority, shall be liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction.

Abb. Forms, 1768.

1. An action may be maintained against a trespasser, who is cutting timber, as soon as the timber is cut. *Sampson v. Hammond*, 4 Cal. 184.

2. An injunction will not be dissolved restraining defendants from felling trees, where the question of boundary is in dispute; especially, where the defendant's bond will fully protect the defendant for any delay "if it should turn out that they have the right." *Buckelew v. Estell*, 5 Cal. 108.

§ 252. *Measure of damages, in certain cases, under the last section.*

Nothing in the last section shall authorize the recovery of more than the just value of the timber, taken from uncultivated woodland, for the repair of a public highway or bridge upon the land, or adjoining it.

1. The measure of damages is not the value of the trees as firewood, but the injury done to the land by destroying them, considering the purposes for which such trees were used or designed, and not according to the speculative or fancied ideas of the jury. *Chipman v. Hibberd*, 6 Cal. 162. See also § 112 and notes, 34 *et passim*.

§ 253. *Damages in actions for forcible entry, etc., may be trebled.*

If a person recover damages for a forcible or unlawful entry in or upon, or detention of, any building or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

Abb. Forms, 1768.

1. When treble damages are given by a statute, the demand for such damages must be expressly inserted in the declaration, which must either recite the statute, or conclude to the damage of the plaintiff against the form of a statute. *Chipman v. Emeric*, 5 Cal. 239. But this does not apply to Justices' Courts; see *O'Callaghan v. Booth*, 6 Id. 66.

2. If the Court refuses to treble the damages, the plaintiff has an adequate remedy by appeal, and an application for mandamus to the Court below to render judgment for treble damages, must be denied. *Early v. Mannix*, 15 Cal. 149.

TITLE XXV.

CHAPTER III.—*Actions to determine conflicting claims to real property, and other provisions relating to actions concerning real estate.*

SECTION 254. Parties to an action to quiet title.

255. When plaintiff shall not recover costs.

256. If plaintiff's title terminates pending the suit, what he may recover, and how verdict and judgment to be.

257. When value of improvements shall be allowed as a set-off.

258. An order may be made to allow a party to survey and measure the land in dispute.

259. Order, what to contain and how served; if unnecessary injury done the party surveying, to be liable therefor.

260. A mortgage shall not be deemed a conveyance, whatever its terms.

261. When Court may grant injunction; during foreclosure; after sale on execution; before conveyance.

262. Damages may be recovered for injury to the possession after sale and before delivery of possession.

263. Action not to be prejudiced by alienation pending suit.

§ 254. *Parties to an action to quiet title.*

An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest.

Bancroft's Forms, 537.

1. **Construction of this section.**—The proceeding by bill in equity, which an individual is allowed to take to set aside a patent or control its operation, is in the nature of a bill to quiet title—to determine an estate held

adversely to him—to remove what would otherwise be a cloud upon his own title; or is in the nature of a bill to enforce a transfer of the interest from the patentee, on the ground that the latter has, by mistake or fraud, acquired a title in his own name, which he should in equity hold for the benefit of the complainant. The individual complaint must therefore possess a title superior to that of his adversary, and of course to that of the government through whom his adversary claims, or he must possess equities which will control the title in his adversary's name. *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279.

2. This section enlarges the class of cases in which equitable relief could formerly be sought in quieting title. It authorizes the interposition of equity in cases where previously bills of peace would not lie. *Curtis v. Sutter*, 15 Cal. 259.

3. It lies with reference to property of which the plaintiff is in possession; and where suit is brought under that section to quiet title to a ranch, and plaintiff is in possession of a portion only, the suit must be considered as brought to determine the title to that portion, and no injunction lies to restrain parties who are entire strangers to the title from selling that portion, as their conveyance would not cloud plaintiff's title. And if the grantees under such conveyance should invade the possession of plaintiff, or unlawfully detain the same, the remedy at law is ample. *Id.*

4. In such suit the Court, sitting in equity, may direct, when proper, an issue to be framed upon the pleadings and submitted to a jury, if questions of a purely legal character in relation to the title arise. *Id.*

5. The true test by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined is this: would the owner of the property in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary the cloud would exist; otherwise not. *Pisley v. Huggins*, 15 Cal. 128.

6. Mining claims fall within the operation of this section. *Merced Mining Co. v. Fremont*, 7 Cal. 319.

7. **Plaintiff, possession essential.**—An action cannot be maintained for the purpose of determining an adverse claim to, or estate, or interest in real property, under section two hundred and fifty-four of the Practice Act, unless the plaintiff, at the time of the commencement of the action, is in the actual possession of the property himself, or in possession by his tenant. *Ferris v. Irving*, 28 Cal. 645; *Lyle v. Rollins et al.*, 25 Cal. 437. The authorities in support of this doctrine are numerous.

8. No matter how such possession was acquired, whether peaceably or forcibly. *Reed v. Calderwood*, 32 Cal. 109.

9. To maintain a suit to quiet title by a party in possession, it is enough that he claims under a deed which creates an equitable estate, or even a right of possession. *Smith v. Brannan*, 13 Cal. 107. One in possession of property, claiming title under a sheriff's deed, executed on a mortgage foreclosure, may maintain an action to quiet his title against another who claims a title against him, which would be good against the mortgagor, although void as against the plaintiff. *Horn v. Jones*, 28 Cal. 194.

10. **Parties defendant.**—Any person in possession may bring this action against any party who claims an estate or interest adverse to him. *Merced Mining Co. v. Fremont*, 7 Cal. 319.

11. Under this section, a party in possession of real property may bring a bill in equity to quiet title against a party out of possession, who claims an estate or interest adverse to him, without waiting until he has been disturbed in his possession by legal proceedings against him, in which his title has been successfully maintained. *Id.*; *Curtis v. Sutter*, 15 Cal. 259.

12. This section does not confine the remedy to the case of an adverse claimant setting up a legal title, or even an equitable title; but embraces every description of claim whereby the plaintiff might be deprived of the property, or

its title be clouded, or its value be depreciated, or whereby he might be incommoded or damaged by the assertion of an outstanding title already held, or to grow out of the adverse pretension. *Head v. Fordyce*, 17 Cal. 149.

13. An action cannot be maintained under the two hundred and fifty-fourth section of the Practice Act, by a landlord against his tenant in possession, for the purpose of determining the validity of an adverse title set up by the tenant. *Van Winkle v. Hinckle*, 21 Cal. 342.

14. Evidence.—A person in possession of property in a position to bring an action, under the two hundred and fifty-fourth section of the Practice Act, to quiet his title thereto, and on the trial no other evidence on his part than proof of possession is necessary in the first instance. *Horn v. Jones*, 28 Cal. 194.

15. In an action brought by one in possession of land, to try and determine an adverse claim set up by one out of possession, when the complaint avers that the defendant sets up an adverse claim without stating what it is, and the answer admits plaintiff's possession, and sets up the particulars of the defendant's alleged title, the burden of proof is cast upon the defendant. *Crook v. Forsyth*, 30 Cal. 662.

16. Action to determine an adverse claim to land, the complaint averring that the plaintiff, who was in possession, deraigned title through a deed from G. Answer, that previous to the execution of G.'s deed, the land was attached at suit of a creditor of his, and was subsequently in due course sold by the sheriff, at which sale defendant became the purchaser. Replication, that a portion of the debt on which the attachment issued was secured by a collateral note, and that the attachment was therefore void. Held, that on these pleadings, in the absence of proof, judgment was properly entered for defendant; that if plaintiff had the right to attack the attachment in this form (a point not decided), the burden of the proof was on him to show that the attachment debt was collaterally secured. *Bostwick v. McCorkle*, 22 Cal. 669.

17. Legal and equitable defenses should not be submitted to a jury together.—The equitable defense should be first passed upon by the Court; and it is irregular to submit to the jury all the legal and equitable defenses together. *Lestrade v. Barth*, 19 Cal. 660.

18. In this case, although the matter constituting the equitable defense was submitted to the jury, and a general verdict rendered for defendant, yet, as no objection was raised to this course of proceeding, either in the Court below or here, the irregularity was not considered in the determination of the appeal. *Id.*

19. Equitable defenses to be passed upon first.—The equitable defense is first to be passed upon by the Court, and until it is disposed of the assertion of the legal remedy is in effect stayed. Upon the determination of the Court upon the relief prayed by the answer, the necessity of proceeding with the action at law will depend. When it does proceed, the legal title will control its result. *Estrada v. Murphy*, 19 Cal. 248.

20. Parties.—See §§ 12, 13.

21. Complaint.—See § 39, No. 287.

22. Answer. See § 46, No. 179.

§ 255. When plaintiff shall not recover costs.

If the defendant in such action disclaim in his answer, any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff shall not recover costs.

Abb. Forms, 1083.

1. In an action to quiet title, where defendants disclaim as to a part of the premises, and as to another part plead that plaintiff was not in possession at

the time of the commencement of the action, it is not error to render judgment against them for costs. *Brooks v. Calderwood*, Jan. T. 1868.

§ 256. *If plaintiff's title terminates pending the suits; what he may recover, and how verdict and judgment to be.*

In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment shall be according to the fact; and the plaintiff may recover damages for withholding the property.

Abb. Forms, 1778.

1. Under our Practice Act, if it appear that the plaintiff in ejectment had a right to recover at the commencement of the suit, but that his right has terminated during its pendency, he cannot recover the possession, but only his damages. *Moore v. Tice*, 22 Cal. 513.

2. The death of the wife, after a suit brought by herself and husband for the homestead, defeats a recovery by the husband, though the right to recover existed at the commencement of the suit. *Gee v. Moore*, 14 Cal. 472.

3. The defendant cannot prove on the trial of an action of ejectment, for the purpose of showing that plaintiff's right of possession has terminated, that since the action was commenced plaintiff has conveyed the land to another person, unless the fact of such conveyance has been set up in the original or supplemental answer. *Moss v. Shear*, 30 Cal. 467.

4. If the plaintiff has conveyed the land demanded pending ejectment, the Court, by the consent of both the plaintiff and vendee, may, under the provisions of the Practice Act, make an order continuing the action in the name of the original plaintiff. *Id.*

5. If the plaintiff in ejectment transfers the demanded premises pending the action, and the Court orders the action continued in the name of the original plaintiff, he may recover judgment for both the possession and the rents and profits. *Id.*

6. The sale and transfer by the plaintiff in ejectment of the demanded premises pending the action, is a transfer of the cause of action within the meaning of the sixteenth section of the Practice Act, and the action may be continued in the name of the original plaintiff. *Id.*

§ 257. *When value of improvements shall be allowed as a set-off.*

When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claims of the plaintiff, in good faith, the value of such improvements shall be allowed as a set-off against such damages.

1. In ejectment, the value of improvements, even when defendant holds under color of title adversely to plaintiff, can only be allowed as a set-off to damages. *Yount v. Howell*, 14 Cal. 464.

2. In an action of ejectment, where no proof is introduced to show damages, it is no error to refuse to allow the defendant to prove the value of the improvements made by him on the property. *Ford v. Holton*, 5 Cal. 319.

3. At common law, no allowance was ever made for improvements; and our Practice Act only permits it to the extent of being used as a set-off to the damages for withholding the property recovered. *Id.*

4. In ejectment, defendant cannot have his improvements set off against the mesne profits under section two hundred and fifty-seven of the Practice Act, where the improvements were made after plaintiff's title accrued, or where the holding of the defendant is not adverse within that section. *Boy v. Pope*, 18 Cal. 694. See *Love v. Shartzer*, 31 Cal. 487.

5. A defendant, who entered under a bond for a deed from the plaintiff, cannot set off his improvements against the damages for use and occupation. *Kilburn v. Ritchie*, 2 Cal. 145.

6. Where the defendant in ejectment occupied and improved the land *bona fide*, under color of title, the improvements erected by him constitute an equitable set-off, to the extent of their value, to the damages recovered by the plaintiff for the withholding of possession. *Welch v. Sullivan*, 8 Cal. 165.

7. The land owner's right to damages cannot be affected on the ground of improvements made by the disseisor, unless it appears that the improvements were made in good faith. *Carpentier v. Small*, Oct. T. 1866.

8. Where one, who entered as a naked trespasser, places improvements on the land, and afterwards buys an undivided interest in an action against him to recover possession of the land by a tenant in common, who owned prior to the wrongful entry, the defendant cannot set off the value of his improvements against the damages. *Carpentier v. Mitchell*, 29 Cal. 330.

9. A defendant in ejectment, who has made permanent improvements on the land in controversy, is not entitled to set off the value of those improvements against the damages claimed by the plaintiff unless the improvements have been made by him, or those under whom he claims, while holding possession under color of title adversely to the claims of plaintiff and in good faith. *Love v. Shartzer*, 31 Cal. 488.

10. In ejectment by a tenant in common against a co-tenant, who took possession wrongfully, but afterwards became a co-tenant, plaintiff cannot in that action recover damages for the period whilst the defendant was unlawfully in possession. *Carpentier v. Mendenhall*, 28 Cal. 485.

11. A tenant in common, in ejectment against his co-tenant, cannot in that action recover damages or mesne profits, for the period during which the possession of the co-tenant was not adverse. *Id.*

12. A tenant in common, who is ousted by a co-tenant, may recover damages in ejectment from the time of the ouster, according to his right. *Id.*

13. Limitation of time to recover rents and profits.—In an action to recover lands, the plaintiff can recover the rents and profits for three years only, prior to the commencement of the action, if the defendant pleads the Statute of Limitations. *Carpentier v. Mitchell*, 29 Cal. 330.

14. In an action to recover possession of land and damages for its detention, if the Statute of Limitations of three years is pleaded as to the damages, the plaintiff can recover damages for only three years before the commencement of the action. *Love v. Shartzer*, 31 Cal. 488.

15. The plaintiff in ejectment, if he recover, is entitled to damages, measured by the value of the rents and profits, up to the time the judgment is rendered. *Id.*

16. Defendant must claim the value of improvements in his answer. The Court cannot, in an action to recover lands, set off the value of improvements against the damages, if the defendant does not desire it. *Carpentier v. Gardener*, 29 Cal. 160.

§ 258. ¹ Who, when, and how an order may be made to allow a party to survey and measure the land in dispute.

The Court in which an action is pending for the recovery of real property, or a Judge thereof, or a County Judge, may,

on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof for the purpose of the action.

¹ Amended 1860, 304.

§ 259. *Order, what to contain, and how served; if unnecessary injury done, the party surveying to be liable therefor.*

The order shall describe the property, and a copy thereof shall be served on the owner or occupant; and thereupon such party may enter upon the property, with necessary surveyors and assistants and make such survey and measurement: but if any unnecessary injury be done to the property, he shall be liable therefor.

§ 260. *A mortgage shall not be deemed a conveyance, whatever its terms.*

A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale.

1. This takes from the instrument its common law character, and restricts it to the purposes of security. It does not, in terms, change the estates at law of the mortgagor and mortgagee; but, by disabling the owner from entering for condition broken, and restricting his remedy to a foreclosure and sale, it gives full effect to the equitable doctrine upon a consideration of which this section was evidently drawn. *McMillan v. Richards*, 9 Cal. 365.

2. The two hundred and sixtieth section of our Practice Act changes this character of the instrument, and takes from the mortgagee all right to the possession, either before or after condition broken, and makes the mortgage a mere lien; but this section does not prevent the owner from making an independent contract for the possession, or from authorizing a sale of the premises, the mortgagee, consenting thereto, to pay the debt. *Fogarty v. Sawyer*, 17 Cal. 589.

3. The words "whatever its terms," in this section, were intended to control the terms of grant, bargain and sale, generally employed in mortgages, and do not relate to stipulations for possession or sale. *Id.*

4. A mortgage executed prior to the passage of the two hundred and sixtieth section of the Practice Act, in 1851, was not a conveyance of a conditional estate to become absolute on a breach of condition, as at common law. *Skinner v. Buck*, 29 Cal. 253.

5. The action for the foreclosure of a mortgage upon real property is not brought for the possession merely of the property, except as such possession may follow the sheriff's or master's deed, but to subject to sale the title which the mortgagor had at the time of executing the mortgage, and to cut off the rights of parties subsequently becoming interested in the premises; and executors and administrators do not possess the title, but only a temporary right to the possession. *Burton v. Lies*, 21 Cal. 87.

6. Section 260 of the Practice Act of 1851, which provides that "a mortgage of real property shall not be deemed a conveyance, whatever its terms,"

etc., applies to all mortgages, as well those executed before as after its passage. *Grattan v. Wiggins*, 23 Cal. 16. See also, *Dutton v. Warschauer*, 21 Cal. 602.

7. A deed of trust, the trustee not being the creditor, but a third party given to secure a note, and authorizing the trustee to sell the land at public auction, and execute to the purchaser a good and sufficient deed of the same, upon default in paying the note or interest, as it falls due, and out of the proceeds to satisfy the trust generally, and to render the surplus to the grantor, etc., is not a mortgage requiring judicial and sale. *Koch v. Briggs*, 14 Cal. 256.

§ 261. *When Court may grant injunction during foreclosure after sale on execution before conveyance.*

The Court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon: or after a sale on execution, before a conveyance.

1. This remedy is only preventive; it is not exclusive of any other remedy. *Sands v. Pfeiffer*, 10 Cal. 258.

2. The remedy by injunction to restrain the removal of fixtures, under section two hundred and sixty-one of the Practice Act, is only preventive; it is not exclusive of any other remedy. *Id.*

§ 262. *Damages may be recovered for injury to the possession after sale and before delivery of possession, who by.*

When real property shall have been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession, after sale and before possession is delivered under the conveyance.

See *ante*, § 246, note No. 105.

§ 263. *Action not to be prejudiced by alienation, pending suit.*

An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

TITLE XXVI

CHAPTER IV.—*Actions for the partition of real property.*

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§ 264. ¹ *Who may bring actions for partition.*

When several co-tenants hold and are in possession of real property as parceners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners.

¹Amended 1854, 90; 1866, 704.

1. The right of partition existing in the co-tenant may be exercised at any time, and may result in the loss to the grantee of the particular parcel conveyed to him. *Stark v. Barrett*, 15 Cal. 361.

2. One tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, compel his co-tenant in possession to account for rents and profits received by him from tenants of the premises. *State of California v. Poullterer*, 16 Cal. 514.

3. In an action for partition of a water ditch, an account of the proceeds for water rates can be taken, and if one of the tenants in common holds a mortgage on the interests of his co-tenants that can be adjusted in the action by an application of the proceeds of the mortgagor's interest towards the payment of the same. *Bradley v. Harkness*, 26 Cal. 69.

4. Two corporations cannot hold land together as joint tenants. *De Witt v. City of San Francisco*, 2 Cal. 289.

5. In an action for partition, if the Court finds that the parties hold, and are in possession of real property, as joint tenants or as tenants in common, in which one or more of them have an estate of inheritance, or for life, or lives, or for years, the partition should be made, although the findings may also show that the plaintiff, in his complaint, has incorrectly set forth the title or interest of the parties, or of one or more of them in the land. *DeUprey v. DeUprey*, 27 Cal. 331.

6. *Parol partition*.—A parol partition of land may be made by co-owners under the Mexican law, as well as by tenants in common under the common law. *Long v. Dollarhide et al.*, 24 Cal. 222.

7. *What constitutes*.—In order to uphold a parol partition under both the Spanish and common law, it must satisfactorily appear that there was not

only an agreement to make the partition, but that the same was fully executed and followed up by a several possession, by either the parties themselves or their grantees. *Id.*

8. An agreement to establish a partition line between the occupants of adjoining tracts of land is of no validity, and cannot be enforced, unless the title to the adjoining tracts has passed from the government and become vested in the parties by whom the agreement is made. In order to render such agreement for a partition line effectual, each party must have the title to and right to dispose of the tract claimed by him; or, in other words, they must be co-terminous proprietors. *Carpentier v. Thirston*, 24 Cal. 280.

9. A parol partition of land owned by tenants in common could be made in California before the adoption of the common law; but the agreement for such partition should be satisfactorily proved, and each tenant in common should have assigned to him and enter upon and possess a specific part of the land in severalty. *Elias v. Verdugo*, 27 Cal. 420.

10. Power of attorney, right to make partition under.—A power of attorney which authorizes the attorney to sell the lands of the constituent, and to do whatever is necessary to carry the power into execution, does not authorize the attorney to make partition of lands in which the constituent has an interest as a tenant in common. *Borel v. Rollins*, 30 Cal. 408.

11. Affirmance of unauthorized act of attorney in fact.—If an attorney in fact, where power does not authorize him to make partition of the land of his principal, makes such partition, the principal may afterwards give effect and confirmation to the partition by the execution of deeds of conveyance, which necessarily recognize the partition as of legal validity. *Id.*

12. Mining claims.—When a mining claim upon the public lands is claimed and possessed by several as joint tenants, tenants in common, or as coparceners, or even as partners, such several interests or estates are in the nature of an estate of inheritance, and liable to be partitioned between the several claimants, the same as other real property. *Hughes v. Devlin*, 23 Cal. 501.

13. The mere fact that a mining claim is owned and worked by several persons as partners, is no valid objection to a partition of the same between the owners, where the answer does not set up, and it is not shown, that a suit in equity is necessary to settle the accounts and adjust the business of the partnership; and all the material allegations in a complaint for partition of real property, which are not denied by the answer, are deemed admitted for the purpose of the trial. *Id.*

14. Of water.—Water flowing in a ditch, and owned by tenants in common, cannot be mechanically partitioned. The only partition which a court can make, which will definitely and permanently end disputes of tenants in common in water used for mining purposes, is to order a sale and a distribution of the proceeds. *McGillivray v. Evans*, 27 Cal. 96.

15. The object of a partition of the property itself among tenants in common, is to enable each party to obtain the title to and the use for all future time, in severalty, of some definite portion of the property owned in common. *Id.*

§ 265. *The interests of all parties shall be set forth in the complaint.*

The interests of all persons in the property, whether such persons be known or unknown, shall be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of

the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint.

Abb. Forms, 687-688.

1. Complaint in partition.—A complaint in an action for partition must aver that the co-tenants hold and are in possession of real property as joint tenants, or as tenants in common, in which property one or more of them have an estate or inheritance, or for life or lives, or for years; and if these averments are not made, it does not state facts sufficient to constitute a cause of action. *Bradley et al. v. Harkness*, 36 Cal. 76.

2. In a complaint to obtain partition of land, a general allegation that "the premises cannot be divided by metes and bounds without prejudice," is sufficient, without an allegation of the facts upon which the plaintiff is to obtain a particular mode of partition. *DeUprey v. DeUprey*, 37 Cal. 331.

3. A complaint in partition is good which is silent upon the subject of the mode of partition. *Id.*

4. Tenant in common of part of a tract of land is proper party in a suit for partition of the whole. *Gales v. Salmon*, July T. 1867; see also, § 13, 14, 39; see *Dutton v. Warschauer*, 21 Cal. 609, and *Hathaway v. DeSoto*, *Id.* 191.

§ 266. *Lien-holders not of record need not be made parties.*

No person having a conveyance of or claiming a lien on the property, or some part of it, need be made a party to the action unless such conveyance or lien appear of record.

¹Amended 1866, 704.

§ 267. *Plaintiff shall file notice of lis pendens.*

Immediately after filing the complaint in the District Court, the plaintiff shall file with the Recorder of the county or of the several counties in which the property is situated, either a copy of such complaint or a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of the filing, it shall be deemed notice to all persons.

¹Amended 1866, 705. Abb. Forms, 110.

§ 268. *Summons shall be directed to all persons interested in the property.*

The summons shall be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment, or otherwise, upon the property, or upon any particular portion thereof; and generally, to all persons unknown, who have or claim any interest in the property.

1. **Parties to suit for partition.**—A married woman, whose husband is sued in partition, is a necessary party if she claims a homestead right to or an interest in the property in dispute. *De Uprey v. De Uprey*, 27 Cal. 331.

§ 269. *Unknown parties may be served by publication.*

If a party having a share or interest is unknown, or any one of the known parties reside out of the State, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party, by publication, as in other cases. When publication is made, the summons, as published, shall be accompanied by a brief description of the property which is the subject of the action.

See § 31.

§ 270. *Answer of defendants, what to contain.*

The defendants who have been personally served with the summons and a copy of the complaint, or who shall have appeared without such service, shall set forth in their answers, fully and particularly, the origin, nature, and extent of their respective interests in the property; and if such defendants claim a lien on the property by mortgage, judgment, or otherwise, they shall correctly state the original amount and date of the same, and the true sum remaining due thereon; also, whether the same has been secured in any other way or not; and if secured, the nature and extent of such security, or they shall be deemed to have waived their right to such lien.

¹Amended 1866, 705. Abb. Forms, 1079.

1. Guardians *ad litem*, appointed to represent an infant in a case of partition, have power to defend for the infant solely against the claim set up for partition of the common estate. *Waterman v. Lawrence*, 19 Cal. 210.

2. The proceeding for partition is a special proceeding, and the statute prescribes its course and effect; and though, after jurisdiction has attached, errors in the course of the cause cannot be collaterally shown to impeach a judgment, yet, so far at least as the rights of infants are involved, the Court has no jurisdiction, except over the matter of partition. *Id.*

3. In an action of partition, a defendant cannot claim that the action be dismissed as to him, on the ground that his answer disclaims any interest in the land, unless he has made the disclaimer in absolute and unconditional terms. *De Uprey v. De Uprey*, 27 Cal. 331.

4. A defendant in partition is not entitled to have the action dismissed by reason of the force and effect of any defense which he may set up in his answer. *Id.*

§ 271. *The rights of all parties may be ascertained in the action.*

The rights of the several parties, plaintiffs as well as

defendants, may be put in issue, tried and determined by such action; and when a sale of the premises is necessary, the title shall be ascertained by proof to the satisfaction of the Court, before the judgment of sale shall be made; and where service of the complaint has been made by publication, like proof shall be required of the right of the absent or unknown parties, before such judgment is rendered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.

Abb. Forms, 1803-1805.

1. If between the parties to an action for partition disputes exist as to their right or interest in any respect, such disputes may be litigated and determined. *Morenhout v. Higuera*, 32 Cal. 289.

2. Under our practice, any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue, tried and determined in such action. *De Uprey v. De Uprey*, 23 Cal. 331.

3. In a partition suit, if the defendant sets up that he is the sole owner of the premises, the Court proceeds in one action and determines all the questions at law; and if the decision is favorable to the plaintiff, then takes up and disposes of the equitable part of the case; if for the defendant, the partition is denied without any further action. *Bollo v. Navarro*, Oct. T. 1867.

4. Title may be tried in an action of partition. *Id.*

§ 272. ¹Partial partition.

Whenever from any cause it shall have become, in the opinion of the Court, impracticable or highly inconvenient to make a complete partition, in the first instance among all the parties in interest, it shall be lawful for the Court to first ascertain and determine the shares or interest respectively held by the original co-tenants, and thereupon to adjudge and cause a partition to be made, as if such original co-tenants were the parties and sole parties in interest and the only parties to the action, and thereafter to proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to whom the same shall have been so set apart, or allow them to remain tenants in common thereof, as they may desire.

¹Amended 1866, 705.

§ 273. ¹Lien-holders shall be made parties, or a referee be appointed to ascertain their rights.

If it shall appear to the Court, by the certificate of the

County Recorder, or County Clerk, or by the sworn or verified statement of any person who may have examined or searched the records, that there are outstanding liens or incumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of said action, and the persons holding such liens are not made parties to the action, the Court shall either order such persons to be made parties to the action, by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or incumbrances have been paid, or if not paid, what amount remains due thereon, and their order among the liens or incumbrances severally held by the said persons and the parties to the said action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security.

Amended 1862, 88.

§ 274. *Lien-holders shall be notified to appear before the referee appointed.*

The plaintiff shall cause a notice to be served a reasonable time previous to the day for appearance before the referee appointed, as provided in the last section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof by his own affidavit or otherwise of the true amount due, or to become due, contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication, or notice to his agents, under the direction of the Court, in such manner as may be proper. The report of the referee thereon shall be made to the Court, and shall be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require.

§ 275. *The Court may order a sale or partition and appoint referees therefor.*

If it be alleged in the complaint, and be established by evidence, or if it appear by the evidence without such allegation, in the complaint, to the satisfaction of the Court, that

the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the Court may order a sale thereof. Otherwise, upon the requisite proofs being made, it shall order a partition, according to the respective rights of the parties, as ascertained by the Court, and appoint three referees therefor; and shall designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained.

See § 309.

§ 276. *'Partition shall be made according to the rights of the parties as determined by the Court.*

In making the partition the referees shall divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the Court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistance to aid them.

¹ Amended 1866, 705.

1. In an action for partition of a water ditch, an account of the proceeds for water rates can be taken, and if one of the tenants in common holds a mortgage on the interest of his co-tenants, that can be adjusted in the action by an application of the proceeds of the mortgagor's interest towards the payment of the same. *Bradley et al. v. Harkness*, 26 Cal. 76.

2. In an action for partition, the plaintiff cannot foreclose a mortgage which he holds on defendant's interest in the property, and cut off defendant's equity of redemption by an absolute sale as in partition. *Id.*

§ 277. *Referees shall make a report of their proceedings.*

The referees shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided, and the shares allotted to each party, with a particular description of each share.

Abb. Forms, 1850.

§ 278. *'The Court may set aside or affirm the report, and enter judgment thereupon; judgment shall be conclusive.*

[1867-8.] The Court may confirm, change, modify, or set aside the report, and, if necessary, appoint new referees. Upon the report being confirmed, judgment shall be rendered that such partition be effectual forever, which judgment shall be binding and conclusive:

First—On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or of any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof as tenants for years or for life.

Second—On all persons interested in the property, who may be unknown, to whom notice shall have been given of the action for partition by publication.

Third—On all other persons claiming from such parties or persons, or either of them.

And no judgment shall be invalidated by reason of the decease of any party before final judgment or decree; but such judgment or decree shall be as conclusive against the heirs, legal representatives or assigns of such decedent, as if such final judgment were entered before such decease.

¹Amended 1866, 705; 1867-8, 629. Abb. Forms, 1803-1805.

1. **Judgment in partition.**—A judgment in an action for partition is binding and conclusive as to title, upon all the parties who are served with summons or appear, and a bar to a new action. *Morehout v. Higuera*, 32 Cal. 289.

2. If the complaint in partition avers that a defendant has, or claims to have, some interest in the land, which interest is unknown to plaintiff, and a summons is served on such defendant, and he fails to appear, and the judgment does not give such defendant any interest, it is *res adjudicata*, and estops him from recovering in a new action. *Id.*

3. The effect of a judgment in partition is to be determined by our statute, and not by the common law. *Id.*

§ 279. *Judgment shall not affect tenants for years to the whole property.*

But such judgment and partition shall not affect tenants for ~~years~~ less than ten, to the whole of the property which is the

SEC. 280. The expenses of the referees, including those of a surveyor and his assistant, when employed, shall be ascertained and allowed by the Court; and the amount thereof, together with the fees allowed by law to the referees, and such attorneys' fees expended for the common benefit, both for plaintiffs and defendants, as the Court shall deem just and proper, shall be apportioned among the different parties to the action.—Amendment approved March 4, 1872—took effect immediately.

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the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the Court may order a sale thereof. Otherwise, upon the requisite proofs being made, it shall order a partition, according to the respective rights of the parties, as ascertained by the Court, and appoint three referees therefor; and shall designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained.

See § 309.

§ 276. *1* Partition shall be made according to the rights of the parties as determined by the Court.

In making the partition the referees shall divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the Court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistance to aid them.

¹ Amended 1866, 705.

1. In an action for partition of a water ditch, an account of the proceeds for water rates can be taken, and if one of the tenants in common holds a mortgage on the interest of his co-tenants, that can be adjusted in the action by an application of the proceeds of the mortgagor's interest towards the payment of the same. *Bradley et al. v. Harkness*, 26 Cal. 76.

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Second—On all persons interested in the property, who may be unknown, to whom notice shall have been given of the action for partition by publication.

Third—On all other persons claiming from such parties or persons, or either of them.

And no judgment shall be invalidated by reason of the decease of any party before final judgment or decree; but such judgment or decree shall be as conclusive against the heirs, legal representatives or assigns of such decedent, as if such final judgment were entered before such decease.

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1. Judgment in partition.—A judgment in an action for partition is binding and conclusive as to title, upon all the parties who are served with summons or appear, and a bar to a new action. *Morehout v. Higuera*, 32 Cal. 289.

2. If the complaint in partition avers that a defendant has, or claims to have, some interest in the land, which interest is unknown to plaintiff, and a summons is served on such defendant, and he fails to appear, and the judgment does not give such defendant any interest, it is *res adjudicata*, and estops him from recovering in a new action. *Id.*

3. The effect of a judgment in partition is to be determined by our statute, and not by the common law. *Id.*

§ 279. *Judgment shall not affect tenants for years to the whole property.*

But such judgment and partition shall not affect tenants for years less than ten, to the whole of the property which is the subject of the partition.

§ 280. *Expenses of partition shall be apportioned among the parties.*

The expenses of the referees, including those of a surveyor and his assistant or assistants, when employed, shall be ascer-

tained and allowed by the Court, and the amount thereof, together with the fees allowed by the Court, in its discretion, to the referees, shall be apportioned among the different parties to the action, equitably.

¹Amended 1868, 706.

§ 281. *A lien on an undivided interest of any party shall be a charge only on the share assigned to such party.*

When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party ;but such share shall be first charged with its just proportion of the costs of the partition, in preference to such lien.

§ 282. *Estate for life or years may be set off in a part of the property not sold, when not all sold.*

When a part of the property only is ordered to be sold, if there be an estate for life, or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

§ 283. *Application of proceeds of sale of encumbered property.*

The proceeds of the sale of the encumbered property shall be applied under the direction of the Court, as follows :

1st. To pay its just proportion of the general costs of the action ;

2d. To pay the costs of the reference ;

3d. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due ; the amount due to be verified by affidavit at the time of payment ;

4th. The residue among the owners of the property sold, according to their respective shares therein.

§ 284. *Party holding other securities may be required first to exhaust them.*

Whenever any party to an action who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the Court may, in its discretion, order such securities to be exhausted before a distribution

of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property, on account thereof.

§ 285. *Proceeds of sale, disposition of.*

The proceeds of sale and the securities taken by the referees, or any part thereof, shall be distributed by them to the persons entitled thereto, whenever the Court so directs. But in case no direction be given, all such proceeds and securities shall be paid into Court, or deposited therein, or as directed by the Court.

§ 286. *When paid into Court, the cause may be continued for the determination of the claims of the parties.*

When the proceeds of sales of any shares or parcels belonging to persons who are parties to the action, and who are known, are paid into Court, the action may be continued as between such parties, for the determination of their respective claims thereto, which shall be ascertained and adjudged by the Court. Further testimony may be taken in Court, or by a referee, at the discretion of the Court, and the Court may, if necessary, require such parties to present the facts or law in controversy, by pleadings, as in an original action.

§ 287. *Sales by referees shall be made at public auction.*

All sales of real property, made by referees under this chapter, shall be made by public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice shall state the terms of sale, and if the property or any part of it is to be sold subject to a prior estate, charge or lien, that shall be stated in the notice.

§ 288. *The Court shall direct the terms of sale or credit.*

The Court shall, in the order for sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants or parties, out of the State.

§ 289. *Referees may take securities for purchase money.*

The referees may take separate mortgages and other securities for the whole, or convenient portions of the purchase money of such parts of the property as are directed by the Court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant in the name of the guardian of such infant, and for other shares, in the name of the Clerk of the county and his successors in office.

¹ Amended 1854, 90.

§ 290. *Tenants whose estate has been sold shall receive compensation.*

The person entitled to a tenancy for life, or years, whose estate shall have been sold, shall be entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing filed with the Clerk of the Court. Upon the filing of such consent, the Clerk shall enter the same in the minutes of the Court.

§ 291. *The Court may fix such compensation.*

If such consent be not given, filed and entered, as provided in the last section, at or before a judgment of sale is rendered, the Court shall ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate; and shall order the same to be paid to such party, or deposited in Court for him, as the case may require.

§ 292. *The Court shall protect tenants unknown.*

If the persons entitled to such estate for life or years be unknown, the Court shall provide for the protection of their rights, in the same manner, as far as may be, as if they were known and had appeared.

§ 293. *The Court shall ascertain and secure the value of future contingent or vested interests.*

In all cases of sales when it appears that any person has a vested or contingent future right or estate in any of the property sold, the Court shall ascertain and settle the proportional

value of such contingent, or vested right or estate, and shall direct such proportion of the proceeds of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties.

§ 294. *Terms of sale shall be made known at the time. Lots shall be sold separately.*

In all cases of sales of property, the terms shall be made known at the time; and if the premises consist of distinct farms or lots, they shall be sold separately.

§ 295. *Who may not be purchasers.*

Neither of the referees, nor any person for the benefit of either of them, shall be interested in any purchase; nor shall a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section shall be void.

§ 296. *Referees shall make a report of the sale to the Court.*

After completing a sale of the property, or any part thereof ordered to be sold, the referees shall report the same to the Court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale; and the securities, if any, taken. The report shall be filed in the office of the Clerk of the county where the property is situated.

§ 297. *If confirmed, conveyances may be executed.*

If the sale be confirmed by the Court, an order shall be entered, directing the referees to execute conveyances and take securities pursuant to such sale; which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

§ 298. *Proceeding if a lien-holder become a purchaser.*

When a party entitled to a share of the property, or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

§ 299. *Conveyances shall be recorded, and will be a bar against parties.*

The conveyances shall be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action; and against all such parties and persons as were unknown, if the summons have been served by publication, and against all persons claiming from them, or either of them.

§ 300. *Proceeds of sale belonging to parties unknown shall be invested for their benefit.*

When there are proceeds of a sale belonging to an unknown owner, or to a person without the State, who has no legal representative within it, the same shall be invested in securities on interest, for the benefit of the persons entitled thereto.

§ 301. *Investment shall be in the name of the Clerk of the county.*

When the security of the proceeds of sale is taken, or when an investment of any such proceeds is made, it shall be done, except as herein otherwise provided, in the name of the Clerk of the county where the papers are filed, and his successors in office, who shall hold the same for the use and benefit of the parties interested, subject to the order of the Court.

§ 302. *When the interests of the parties are ascertained, securities shall be taken in their names.*

When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing under their hands delivered to the referees, agree upon the shares and proportions to which they are respectively entitled; or when shares and proportions have been previously adjudged by the Court, such securities shall be taken in the names of, and payable to, the parties respectively entitled thereto; and shall be delivered to such parties upon their receipt therefor. Such agreement and receipt shall be returned and filed with the Clerk.

§ 303. *Duties of the Clerk making investments.*

The Clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, shall receive the interest and principal as it becomes due, and apply and invest the same as the Court may direct; and shall file in his office all securities taken, and keep an account in a book provided and kept for that purpose, in the Clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

§ 304. *'When unequal partition is ordered, compensation may be adjudged in certain cases.*

When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the Court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it shall appear that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases the Court shall have power to make compensatory adjustment between the respective parties, according to the ordinary principles of equity.

¹Amended 1866, 706.

§ 305. *The share of an infant may be paid to his guardian.*

When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law, or directed by order of the Court.

§ 306. *The guardian of an insane person may receive the proceeds of such party's interest.*

The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property shall have been sold, may receive, in behalf of such person, his share of the proceeds of such real property, from the referees, on executing with sufficient sureties, an

undertaking approved by a Judge of the Court, or by a County Judge, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative.

§ 307. *A guardian may consent to partition without action, and execute releases.*

The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant or other person entitled, and may execute a release in his behalf to the owners of the shares, of the parts to which they may be respectively entitled, upon an order of the Court.

§ 308. *Costs of partition a lien upon the shares of the partners.*

The costs of partition, including fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case, they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, a litigation arises between some of the parties only, the Court may require the expense of such litigation to be paid by the parties thereto, or any of them.

§ 309. *The Court by consent may appoint a single referee.*

The Court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this chapter ; and the single referee, when thus appointed, shall have all the powers and perform all the duties required of the three referees.

See Gray's New York Practice, Special Proceedings.

TITLE XXVII.

CHAPTER V.—*Actions for the usurpation of an office or franchise.*

SECTION 310. Action may be brought against any party usurping, etc., any office or franchise.

311. Name of person entitled to office may be set forth in the complaint; if fees have been received by the usurper, he may be arrested.

312. Judgment may determine the rights of both incumbent and claimant.

313. When rendered in favor of applicant.

314. Damages may be recovered by successful applicant.

315. When several persons claim the same office, their rights may be determined by a single action.

316. If defendant found guilty, what judgment to be rendered against him.

§ 310. *Action may be brought against any party usurping, etc., any office or franchise.*

An action may be brought by the Attorney General in the name of the people of this State, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State. And it shall be the duty of the Attorney General to bring the action, whenever he has reason to believe , intruded , or when

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6. An action under section three hundred and ten of maintained against one in possession of an office to which elected, who holds a certificate of election proper in election canvassers. *People v. Jones*, 20 Cal. 50.

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Practice, Special Proceedings.

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§ 310. *Action may be brought against any party usurping, etc., any office or franchise.*

An action may be brought by the Attorney General in the name of the people of this State, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State. And it shall be the duty of the Attorney General to bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the Governor.

1. *Generally.*—This writ is to prevent the usurpation of any office, franchise or liberty, as also to afford a remedy against corporations for a violation of their charters, tending to a forfeiture thereof. *Ex parte the Attorney General*, 1 Cal. 87.

2. The code provides a remedy against any person who usurps, intrudes into or unlawfully holds or receives any public office, civil or military, or any franchise in the State. *People v. Olds*, 3 Cal. 175.

3. The distinction between writs of mandate and *quo warranto*, as held in England, is not abolished by the statutes of this State, but is fully recognized. *Id.* 177.

4. An information in the nature of a *quo warranto* is the proper proceeding to try the title to an office. *People v. Scannell*, 7 Cal. 439.

5. *Quo warranto* lies to test the right of an appointee of the board of pilot commissioners. *Palmer v. Woodbury*, 14 Cal. 43.

6. An action under section three hundred and ten of the Practice Act may be maintained against one in possession of an office to which he has not been duly elected, who holds a certificate of election proper in form from the board of election canvassers. *People v. Jones*, 20 Cal. 50.

7. **Who has jurisdiction to grant the writ.**—On petition of the Attorney General for a writ of *quo warranto* against a tax collector: *Held*, that the Court had no jurisdiction, and the prayer of the petition was denied. *The Attorney General ex parte*, 1 Cal. 85.

8. This Court is strictly an appellate tribunal, and has no original jurisdiction except in cases of *habeas corpus*, and consequently is not empowered to issue a writ of *quo warranto* for the purpose of inquiring by what authority a person exercises the duties of a collector of the foreign license tax. *Id.*

9. The act giving jurisdiction over the subject of contested elections to the Judge of the County Court, is constitutional, and District Judges are embraced within it. *Saunders v. Haynes*, 13 Cal. 145.

10. This is one of the "special cases," of which the Constitution provides that the County Judge may take cognizance when authorized by the Legislature. *Id.*

11. **Intruder, who is.**—A person holding a certificate of election without the right and legal title to the office, is an intruder within the meaning of the act. *People v. Jones*, 20 Cal. 50.

12. **Certificate of election.**—The real right or title to the office comes from the will of the voters as expressed at the election. If the office was in fact given by the voters to another, the possession by the defendant of the certificate affords him, at most, but a color of title, and does not invest him with the right which belongs to another. *Id.*

13. A certificate of election is not necessary to enable a party, claiming to have been elected, to bring his action by *quo warranto*. *Magee v. Supervisors of Calaveras County*, 10 Cal. 376.

14. Such certificate is only *prima facie* evidence of title to the office, not conclusive. Nor is it the only evidence by which the title may be established. It is the fact of election which gives title to the office, and this fact may be established, not only without, but against the evidence of the certificate. *Id.*

15. In the case of an election to office by the people, the issuance of a commission is a mere ministerial act. *Conger v. Gilmer*, 32 Cal. 75.

16. **Vacancy, what constitutes.**—The Constitution itself clearly defines the sense of the phrase "vacancy of the office of Governor," as used in the sixth section, by specifically enumerating in the succeeding section the instances which devolve, in the duties of the executive, upon the Lieutenant Governor. *People v. Whitman*, 10 Cal. 38.

17. The failure on the part of the Controller elect to qualify, creates no vacancy in the office. *Id.*

18. When the Constitution clearly enumerates the events that shall constitute a vacancy in a particular office, we must suppose all other causes of vacancy excluded, especially when this construction can lead to no injurious result. *Id.* But see *Brooks v. Maloney*, 15 Cal. 58.

19. In determining upon the sufficiency of the bond of an officer, and whether the officer, by his failure to comply with the requisition of the supervisors to file a new bond, has vacated his office, the supervisors exercise powers of a judicial character. *People v. Supervisors of Marin County*, 10 Cal. 344.

20. The provision of the statute organizing Boards of Supervisors, which empowers them to "require new bonds of any county or township officer, with additional securities *whenever they deem the same necessary*," does not leave the exercise of the power to their arbitrary discretion. By the terms "*whenever they deem the same necessary*," is meant whenever their judgment pronounces, after an examination of the facts of the case, that there is a necessity for further security. *Id.*

21. An order of the supervisors requiring a new bond of an officer, should specify the ground upon which the order is made; and where the supervisors of Marin county made an order as follows: "Ordered, by the Board of Supervisors, that John De Fries, constable of San Rafael township, file another bond, with two or more sufficient sureties, within fifteen days." *Held*, that the order was fatally defective. *Id.*

22. The power to declare an office vacant is vested, under the statute, where the duty to approve of the bond of the officer is lodged. That duty is imposed

upon the county Judge, and not the supervisors; and where the supervisors of Marin county declared the office of constable vacant, because the constable failed to comply with their order to file a bond: *Held*, that they exceeded their jurisdiction. *Id.*

23. **Appointment to office.**—The Boards of Supervisors, in filling vacancies in office, appoint to office; they do not elect. *Conger v. Gilmer*, 32 Cal. 75.

24. **When complete.**—The appointment to office by the Board of Supervisors is not complete until the person appointed has received a certificate of his election under the seal of the Board, signed by the proper officers of the Board. An appointment made by a majority of the Board may be revoked at any time before such certificate is issued, and another person may be appointed. *Id.*

25. **Appointment may be rescinded, when.**—An appointment to fill vacancy in office may be rescinded at any time before the commission or certificate of appointment has been made out in due form. *People v. Gilmer*, Jan. T. 1887; *Conger v. Gilmer*, 32 Cal. 75.

26. **Who may appoint to office.**—An act of the Legislature, authorizing Boards of Supervisors to appoint a collector of foreign miners' licenses, is not unconstitutional. Assessors and tax collectors are constitutional officers; but it is not necessary, under the thirteenth section of article eleven of the Constitution, that every portion of the revenue pass through their hands. The Legislature may authorize the tax-payer to pay his taxes directly into the treasury. *Attorney General v. Squires*, 13 Cal. 12.

27. The sheriff being *ex officio* tax collector of foreign miners' licenses by an act of the Legislature, may be deprived of the office of tax collector before the expiration of his term. *Id.*

28. The Legislature, having vested certain duties in a public officer, for whose services compensation is allowed, may take those duties and the fees from the office, before the expiration of the term, and confer them upon another officer. *Id.*

29. *Smith v. Stillman*, decided in 1852 (not reported), to the effect that after the Legislature has created an office, contemplated or provided for by the Constitution, it cannot destroy the office of the incumbent during his term, overruled. *Id.*

30. No appointing power in this State can determine conclusively upon the capacity of the appointee to hold office. That question may be examined in the Courts. *Palmer v. Woodbury*, 14 Cal. 43.

31. The Board of Pilot Commissioners, under the Act of 1854, as amended by the Act of 1855, have only the powers conferred by the Act, and must appoint the pilots from the classes of persons named therein. They cannot appoint a man as pilot who has not served two years on a pilot boat in the harbor, or commanded a vessel in and out of port for three years. *Id.*

32. The power to remove is an incident to the power to appoint, as a general proposition, and is made so expressly by the Constitution. *People v. Hill*, 7 Cal. 97.

33. A law which provides that an officer may be removed in a certain way, or for a certain cause, does not restrain or limit the power of removal to the cause or manner indicated. *Id.*

34. **When proclamation necessary.**—An election to fill a vacancy caused by a resignation is a special election, and the Governor's proclamation is essential to its validity. *Westbrook v. Rosborough*, 14 Cal. 180.

35. The office of County Judge is not a "county office," within the meaning of the act entitled "an act to amend an act to regulate elections," passed March 23d, 1850; consequently, the Board of Supervisors cannot order a special election to fill a vacancy in that office. *People v. Martin*, 12 Cal. 409.

36. An election to fill a vacancy in the office of District Judge is invalid, unless made under and in pursuance of the proclamation of the Governor. *People ex rel. McKune v. Weller*, 11 Cal. 49.

37. The statute requiring the Governor to issue his proclamation of election

to fill vacancies in certain offices is mandatory, and an essential prerequisite to all such elections. *Id.*

38. The object of the proclamation is to give notice to the electors that such an election will be held. *Id.*

39. F. was elected, in the month of May, 1857, County Judge of San Mateo county, in pursuance of the provisions of "an act to organize and establish the county of San Mateo." No proclamation of the Governor was issued calling this election. At the general election in 1858, in pursuance of the proclamation of the Governor, an election was held for the same office, and T. was elected. *Held*, that F. was entitled to the office. *People ex rel. Fox v. Templeton*, 12 Cal. 394.

40. The function of the proclamation is not to proclaim the law, but the fact of the vacancy. It cannot change either the law or the Constitution. *People ex rel. Attorney-General v. Burbank*, 12 Cal. 378.

41. **Election, time.**—An ordinance was passed by the Board of Supervisors of the city and county of Sacramento, June, 1858, relative to the cemetery, in which it was provided that the Board should appoint a person to superintend the cemetery "annually, in October, who shall hold office for the term of one year," and, further, that the Board, at their first meeting after the passage of the ordinance, should appoint a superintendent to hold office "until October next, and until his successor is appointed and qualified." Defendant was so appointed July 8th, 1858; and held the office until December, 1859, the Board having failed to appoint his successor before that time, when relator was appointed. *Held*, that relator is entitled to the office; that the failure to appoint in October, 1858 and 1859, did not exhaust the power of the electoral body—the time named being directory, and not of the essence of the power. *Jacobs v. Murray*, 15 Cal. 221.

42. The rule is, that when time is prescribed to a public body in the exercise of a function in which the public is concerned, the period designated is not of the essence of the authority, but is a mere directory provision. *Id.*

43. Where an election for the office of District Judge was held by the qualified electors of such district at the general election in 1858, and the term of the present incumbent of that office does not expire until January, 1861: *Held*, that such election was unauthorized, and the person elected is not entitled to a commission to such office. *People ex rel. Brodie v. Weller*, 11 Cal. 77. *Affirmed in People v. Burbank*, 12 Cal. 378.

44. The statute, so far as it affects the election of 1858, only applies to such offices as were to become vacant in January, 1859, and this is evidence as well as by the terms of the act as the unreasonableness of supposing that the Legislature meant to authorize an election several years in advance of the time when the office was to be filled. *People ex rel. Brodie v. Weller*, 11 Cal. 77.

45. An election cannot take place under the Constitution without statutory regulation. All the efficacy given to the act of casting a ballot is derived from the law-making power, and through legislative enactments; and the Legislature must provide for and regulate the conduct of an election, or there can be none. *People ex rel. McKune v. Weller*, 11 Cal. 49.

46. **What will vitiate an election.**—The provisions of our statute clearly indicate that the Legislature did not mean that the returns of a candidate should be set aside, where an election was held at the proper time and place, and for the proper officers, unless it affirmatively appeared that there was such irregularity as affected the result of the election. *Whisley v. McKune*, 12 Cal. 352.

47. The failure of the officers conducting an election in a given district to be sworn as the election laws provide, will not invalidate the entire election without reference to its influence on the general result. *Id.*

48. The fact that the ballot-box was temporarily out of the possession of the officers of the election will not invalidate the election, especially where no fraud, collusion, or suspicious circumstances are shown. *Id.*

49. The rule is well settled, that the mere receiving and counting votes, improperly given, will not invalidate an election. *Id.*

50. Where such irregularities have occurred, it rests with the contestant to show them. The returns are *prima facie* evidence of the fact they import; and

the returned candidate, after being commissioned, is *prima facie* entitled to the office. *Id.*

51. **What is a lucrative office.**—The place of Pilot in the port of San Francisco is an office. *Palmer v. Woodbury*, 14 Cal. 43.

52. **Query:** Whether the place or employment of Inspector of Customs is a lucrative office, under the United States, within the constitution of this State. *Saunders v. Haynes*, 13 Cal. 145.

53. The Federal office of Surveyor General is a "lucrative office," and the office of Controller of State an "office of profit," under the twenty-first section of the fourth article of the Constitution of this State. *People ex rel. Melony v. Whitman*, 10 Cal. 38.

54. **Holding office, what constitutes.**—To constitute the "holding" of an office, within the meaning of the Constitution, there must be the concurrence of two wills—that of the appointing power, and that of the person appointed. *Id.*

55. It is only in cases where there is no incumbent to hold over that the law will allow the appointment of the Executive to fill the office. *Id.*

56. As regards the appointing power, the appointment is complete when the commission is duly issued by the President, but the person appointed is required to give bond and take the oath of office before he can possess the office. These acts constitute a condition precedent to the holding of the office. *Id.*

57. **Who are eligible to office.**—On the sixteenth day of August, 1867, A. received from the President of the United States a commission of Surveyor General for the State of California. At a general election held on the third day of September, 1857, A. and B. were candidates for the office of State Controller of the State of California; A. received the highest number of votes, but never qualified or claimed the office. On the sixth day of September, 1857, A. gave bond and took the oath of office under the commission as Surveyor General, and on the ninth day of the same month entered upon the duties of such office, and on the fifteenth notified the President of his acceptance of the same. *Held*, that A. was eligible to the State office when the votes were cast for him, and was duly elected thereto. *The People ex rel. Meloney v. Whitman*, 10 Cal. 38. But see *Brooks v. Melony* 15, Cal. 58.

58. There is nothing in the constitution or laws of this State, nor is there any usage or custom which requires that a license to practice law from the Supreme or any other Court, must be obtained before a person can become eligible to the office of District Attorney. *People v. Dorsey*, 32 Cal. 296.

59. **Term of office.**—At the general election held in Yuba county in September, 1855, W. was elected county treasurer of that county for two years from the date of his election, and until his successor was chosen and qualified. On the twenty eighth day of April, 1857, a special act was passed, extending the term of this officer to the first Monday in January, 1858. On the seventh of May, 1857, W. resigned, and S. P. W. was appointed by the Board of Supervisors in his stead. At the general election in September, 1857, F. received the majority of votes for that office for the unexpired term of W., and claimed the office. *Held*, that the appointee held for the balance of the extended term, and that there was no vacancy to be filled at the election in September, 1857. *People ex rel. Fowler v. Wells*, 11 Cal. 329.

60. By the Constitution, Judges of the county court hold their offices, when elected, for four years. It is in the power of the Legislature in organizing, or after organizing, a new county, to prescribe the time of elections for county officers, and also the period of the commencement of their terms; but it is not competent for the Legislature to change the period of the tenure of the office of Judge of county courts, any more than to change those of Supreme and District Judges. It is evident, from the terms of this act, that it was contemplated that these officers—the Judge among them—should enter upon their offices as soon as the election was announced, or within a reasonable time thereafter. *People ex rel. Fox v. Templeton*, 12 Cal. 394.

61. The Constitution, though it fixes the period of the tenure of the office

of District Judge, does not fix any day for the commencement of the term; and if it did, it would not follow that it applies to Judges afterwards elected to new districts, nor would it result that the Judge elected in consequence of a vacancy was necessarily elected to fill such vacancy. *People ex rel. Attorney General v. Burbank*, 12 Cal. 378.

62. The Legislature can direct the time and prescribe the mode of electing District Judges, but cannot change the tenure of the office; hence, so much of the act as limited the period of incumbency is void. *Id.*

63. When the Constitution says the Judge shall hold his office for six years, it means that this period of six years is the term of his office; it is that *quantum* of time assigned to him by the Constitution as his period of the enjoyment of the office, and this *quantum* may not improperly be called a term. *Id.*

64. All the Constitution means by the expression "during the term," as used in sections fifteen and sixteen of article sixth, is during the time or period for which the officer is elected. *Id.*

65. The Constitution affixes no period of tenure to the office of tax collector, nor does it provide any mode of appointment. So far as this office exists in the incumbent, it is an office created by legislative act. The Legislature may direct how it shall be filled, and how its duties shall be discharged. *Attorney General v. Squires*, 14 Cal. 12.

66. Where the appointment to an office is vested in the Governor, with the advice and consent of the Senate, and the term of the incumbent expires during the recess of the Senate, the Governor has the right to fill such vacancy, and his appointment vests in the appointee the right to hold and discharge the duties of such office for the full term, subject only to be defeated by the non-concurrence of the Senate. *People ex rel. Attorney General v. Addison*, 10 Cal. 1.

67. The period of the tenure of a County Judge is fixed by the Constitution at four years. The Legislature may fix the commencement of the term, as also the time of election. *Westbrook v. Rosborough*, 14 Cal. 180.

68. If the incumbent resigns before the expiration of his term, there is a vacancy to be filled by the Governor. His appointee would hold until the next general election, or at most, until the qualification of the person elected by the people. *Id.*

69. Where an act, organizing a county, provides for the election of a County Judge, and limits the period of tenure to two years, the act is void, *pro tanto*; but the election held under the act is good, and entitles the incumbent to the office for four years. *Id.*

70. The full term of office of Judge Norton, of the Twelfth District Court, commenced with his qualification, January 2d, 1855, and expired six years thereafter; and the only election at which his successor could be elected was the general election in November, 1860. *Brodie v. Campbell*, 17 Cal. 11.

71. The appointee of the Governor to the office of County Judge will hold, over a person elected to the same office at a special election ordered by the Board of Supervisors of the county. *People ex rel. Attorney General v. Martin*, 12 Cal. 409.

72. By the provisions of the Constitution, the manner of electing and the term of the office of Comptroller are the same as that of Governor; and, consequently, if the Comptroller elect fails to qualify, the incumbent holds over until his successor is elected and qualified. *The People ex rel. Melony v. Whitman*, 10 Cal. 38.

73. The term of the office of Governor is fixed at two years certain, with a contingent extension. When this contingency happens, this extension is as much a part of the entire term as any portion of the two years. *Id.*

74. The present incumbent of the office of Comptroller is entitled to hold the office until his successor is elected and qualified; and such successor may be elected at the general election of 1856, and when qualified, will hold his office for the term of two years and until his successor is qualified. *Id.*

75. From the time of the assumption of the office, the term of the Judge elected would legally commence, and terminate at the expiration of four years from that time. *People ex rel. Fox v. Templeton*, 12 Cal. 394.

76. A person duly elected Judge of the District Court of this State is entitled to hold office for the period of six years. *People ex rel. Brodie v. Weller*, 11 Cal. 77.

77. *Resignation of office.*—One who has been elected to an office cannot resign the same until the time has arrived when he is entitled by law to possess the same, and he has taken the oath and given the required bond, and entered upon the discharge of its duties. *Miller v. Board of Supervisors of Sacramento County*, 25 Cal. 97.

78. *Judicial officers.*—The sheriff is not a judicial officer. And though the offices of sheriff and tax collector are distinct by the Constitution, yet they may be united in the same hands. *Attorney General v. Squires*, 14 Cal. 12.

79. It seems the offices of sheriff and tax collector are constitutional offices. *Id.*

80. *Judge de facto.*—One entering into the possession of the office of Judge of a District Court, by color of right, becomes a Judge *de facto*, and his title to the office can be questioned only by an action brought directly for that purpose. *People v. Sasovich*, 29 Cal. 480.

§ 311. *Name of person entitled to office may be set forth in the complaint; if fees have been received by the usurper he may be arrested.*

Whenever such action is brought, the Attorney General, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a Judge of the Supreme Court, or a District Judge, for the arrest of such defendant, and holding him to bail; and thereupon he may be arrested, and held to bail, in the same manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

Abb. Forms, 42.

1. *What are not sufficient allegations.*—In *quo warranto* to determine the right to an office, an allegation that defendant is in possession of the office without lawful authority, is a sufficient allegation of intrusion and usurpation. *Palmer v. Woodbury*, 14 Cal. 43.

2. If the complaint be defective in this particular, the defect must be reached by special demurrer. *Id.*

3. In an action by one claiming to have been elected to an office against his predecessor, to compel a surrender of the books, papers, etc., belonging to the office, plaintiff must show *prima facie* that a vacancy existed in the office, and that he was elected to fill it. *Doane v. Scannell*, 7 Cal. 393; *Id.* 439.

4. *Who cannot demur.*—In *quo warranto* for an alleged usurpation of the office of pilot for the port of San Francisco, the complaint avers that defendants hold, use, exercise, usurp and enjoy the office without a license, and also

certain allegations as to the right of relator to the office: *Held*, that these allegations as to relator's right cannot be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the right of relator, but only in the determination of their own right to the office. *Flynn v. Abbott*, 16 Cal. 358.

5. **New trial, not authorized.**—In a special case to contest an election under the statute, the County Court has no power to grant a new trial, and an appeal to the Supreme Court must be taken from the judgment, and a statement on appeal be made and settled to enable the Supreme Court to review the proceedings below outside the judgment roll. *Casgrave v. Howland*, 24 Cal. 457.

6. **Ineligibility no defense.**—In a proceeding to contest the election of defendant as District Judge, the ineligibility of the candidate receiving the highest number of votes, the defendant being next on the list, is no defense; because this matter, if true, could not protect the incumbent from the consequences of an unauthorized possession of the office. *Saunders v. Haynes*, 13 Cal. 145.

7. The fact that the candidate receiving the highest number of votes at an election by the people is ineligible does not give the office to the next highest on the list. *Id.*

§ 312. *Judgment may determine the rights of both incumbent and claimant.*

In every such case, judgment may be rendered upon the right of the defendant, and also upon the right of the party, so alleged to be entitled; or only upon the right of the defendant, as justice shall require.

Abb. Forms, 1808-1809.

1. In an action of *quo warranto* to determine the right to an office where the relator claims the office as against the incumbent, the Court may not only determine the right of the defendant, but of the relator also; and if it determines in favor of the relator, may render judgment that the defendant forthwith deliver up to the relator the office. *People v. Banvard*, 27 Cal. 470.

2. Contestant cannot take judgment by default. *Keller v. Chapman*, April T. 1868.

§ 313. *When rendered in favor of applicant.*

If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office.

§ 314. *Damages may be recovered by successful applicant.*

If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he shall have sustained, by reason of the usurpation of the office by the defendant.

§ 315. *When several persons claim the same office, their rights may be determined by a single action.*

When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

§ 316. *If defendant found guilty, what judgment to be rendered against him.*

When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise, or privilege, judgment shall be rendered that such defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The Court may also, in its discretion, impose upon the defendant a fine not exceeding \$5,000; which fine, when collected, shall be paid into the treasury of the State.

[In regard to a person holding two or more offices at the same time, see *People v. Provines*, Oct. T. 1867, where all the authorities are discussed and many overruled.]

TITLE XXVIII.

CHAPTER VI.—*Of actions against steamers, vessels and boats.*

- SECTION 317. When vessels, etc., shall be liable. Their liabilities shall constitute liens.
318. Actions may be brought directly against such vessels, etc.
319. Complaint shall be verified.
320. Summons may be served on the master, mate, etc.
321. Plaintiff may have such vessel, etc., attached.
322. The clerk shall issue the writ of attachment.
323. Such writ shall be directed to the sheriff. Sheriff may release upon sufficient undertaking.
324. Sheriff shall execute such writ without delay.
325. The owner, master, etc., may appear and defend such vessel.
326. Proceedings in actions under this chapter.
327. After appearance attachment may, on motion, be discharged.
328. When not discharged, such vessel, etc., may be sold at public auction. Application of proceeds.
329. Mariners and others may assert their claim for wages, notwithstanding prior attachment; how enforced.
330. Proof of the claims of mariners and others.
331. Sheriff's notice of sale shall contain measurement, tonnage, etc.
332. Appeals may be taken from proceedings under this chapter.

§ 317. ¹When vessels, etc., shall be liable. Their liabilities shall constitute liens.

All steamers, vessels, and boats, shall be liable :

1st. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees.

2d. For supplies furnished for their use, at the request of their respective owners, masters, agents, or consignees.

3d. For materials furnished for their construction, repair, or equipment.

4th. For their wharfage and anchorage within this State.

5th. For non-performance or mal-performance of any contract for the transportation of persons or property made by their respective owners, masters, agents, or consignees.

6th. For injuries committed by them to persons or property.

The said several causes of action shall constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated, and shall have preference over all other demands ; *provided*, such liens shall only continue in force for the period of one year from the time the cause of action accrued.

¹ Amended 1860, 304. This chapter is applicable to Justices' Courts.

1. Jurisdiction.—This act, so far as it authorizes actions *in rem* against vessels for causes of action designated under the fifth subdivision of this section, is unconstitutional. *The Moses Taylor*, 4 Wallace U. S. Rep. 411.

2. The jurisdiction of the Federal Courts in such cases is exclusive. *Id.*

3. State statutes, which attempt to confer upon State Courts a remedy for marine torts and marine contracts by proceeding strictly *in rem*, are void. *The Hine v. Trevor*, 4 Wallace U. S. Rep. 556.

4. But this rule does not prevent the seizure and sale, by the State Courts, of the interest of any owner, or part owner, in a vessel by attachment against said owner, to recover a debt for which he is personally liable. *Id.* Nor does it prevent any action which the common law gives for the obtaining a judgment *in personam* against a party liable in a marine contract, or a marine tort. *Id.*

5. In cases not within the jurisdiction of the Admiralty Courts, there can be no question that the Legislature may devise or adopt any kind of remedy. *The People v. Steamer America*, Jan. T. 1868.

6. A cause of action, to be cognizable in admiralty, whether arising out of a contract, claim, service or obligation, or liability of any kind, must relate to the business of commerce and navigation. *Id.*

7. Harbor commissioners may bring suit under this section in the name of the people. *Id.*

8. First subdivision.—A British seaman on board a British vessel of which a British subject is master, may, when discharged by the master in a port of the United States, without any fault on the part of the seamen, sue for and recover his wages in a State Court. *Pugh v. Gillam*, 1 Cal. 485.

9. If a credit is given for supplies and materials furnished a vessel, the lien

of the person furnishing the same, for the price thereof, continues on the vessel for the period of one year from the time the demand falls due. *Edgerdy v. Schooner San Lorenzo*, 29 Cal. 418.

10. **Sixth subdivision.**—Steamboat companies, in propelling boats on the river, must provide all reasonable precaution to protect the property of others, and they must also be properly used. Carelessness in either particular, resulting to the injury of an innocent party, will make the company liable. They are bound to temper their care according to circumstances of the danger. *Gerke v. California Steam Nav. Co.*, 9 Cal. 251.

11. **Part owners have no lien for advances.**—A part owner of a vessel has no lien on the shares of the other part owners for his advances and disbursements. *Sterling v. Hanson*, 1 Cal. 480.

12. In actions against boats and vessels, under the statute, the lien attaches only when service is had in the suit. It was not the intention of the Legislature to make the lien attach when the liability was incurred. *Fisher v. White*, 8 Cal. 418.

13. As soon as a vessel is seized by a Court of Admiralty a lien attaches in favor of the party at whose instance the seizure is made. If it was the intention of the legislature to provide that a lien should only be acquired by attachment, this would virtually be denying a right to creditors for small sums. It would be almost impossible for a merchant or mechanic of small capital or credit, who had a claim of a few hundred dollars against one of our large steamers or some seagoing vessel, to give the necessary bonds to detain her until his suit could be determined, and in the meantime she might be run off and sold free of all such debts or incumbrances. *Meiggs v. Scannell*, 7 Cal. 408.

§ 318. *Actions may be brought directly against such vessels, etc.*

Actions for demands arising upon any of the grounds specified in the preceding section may be brought directly against such steamers, vessels or boats.

§ 319. *Complaint shall be verified.*

The complaint shall designate the steamer, vessel, or boat by name, and shall be verified by the oath of the plaintiff, or some one on his behalf.

§ 320. *Summons may be served on the master, mate, etc.*

The summons attached to a certified copy of the complaint, may be served on the master, mate, or any person having charge of the steamer, vessel, or boat, against which the action is brought.

1. The rule that requires seizure of the thing to give jurisdiction in actions *in rem*, is altered by our statute. Service on a person standing in a particular relation to the thing confers jurisdiction on the Court from which process issues. *Averill v. Steamer Hartford*, 2 Cal. 309; *Meiggs v. Scannell*, 8 Id. 408; *Fisher v. White*, Id. 422.

2. Hence jurisdiction *in rem* may exist in several Courts at the same time. *Id.*

3. The rule of law that possession of personal property is *prima facie* evidence of ownership is uniform in its application. The question of the ownership of a vessel forms no exception to the rule. *Bailey v. New World*, 2 Cal. 370.

§ 321. *Plaintiff may have vessel, etc., attached.*

The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the steamer, vessel, or boat, against which the action is brought, with its tackle, apparel, and furniture, attached as security for the satisfaction of any judgment that may be recovered therein.

1. In an action against boats and vessels, under the statute, the service of process in the manner prescribed by statute is equivalent to an actual seizure. *Meiggs v. Scannell*, 7 Cal. 405.

2. In such actions it is not necessary that the vessel should be attached in order to acquire a lien as against subsequent purchasers. *Id.*

§ 322. *The Clerk shall issue the writ of attachment.*

The Clerk of the Court shall issue a writ of attachment, on the application of the plaintiff, upon receiving a written undertaking on behalf of the plaintiff, executed by two or more sufficient sureties, to the effect, that if judgment be rendered in favor of the steamer, vessel, or boat, as the case may be, he will pay all costs and damages that may be awarded against him, and all damages which may be sustained by such steamer, vessel, or boat from the attachment, not exceeding the sum specified in the undertaking, which shall in no case be less than five hundred dollars when the attachment is issued against a steamer or vessel, or less than two hundred dollars when issued against a boat. The undertaking shall be accompanied by an affidavit of each of the sureties, that he is a resident and freeholder or householder of the county, and worth double the amount specified in the undertaking over and above of his just debts and liabilities. The Clerk shall file the undertaking and affidavits.

§ 323. *Such writ shall be directed to the Sheriff. The Sheriff may release upon sufficient undertaking.*

The writ shall be directed to the Sheriff of the county within which the steamer, vessel, or boat lies, and direct him to attach such steamer, vessel, or boat, with its tackle, apparel, and furniture, and keep the same in his custody until discharged by due course of law; unless the owner, master, agent or consignee thereof, give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy the demand in suit, which shall be specified in the writ, besides costs; in which case, to take such undertaking.

1. Where a bond was given in a case where the vessel was not liable to be attached under the statute : *Held*, that judgment rendered against the principal and sureties in the bond was erroneous; and that a bond given for the release of a vessel, when the vessel was not liable to seizure under that act, was invalid. *McQueen v. The Russell*, 1 Cal. 165.

2. When the bond is given the vessel shall be released, leaving the action to proceed in the same manner against the vessel as if the vessel was not liable. *Id.*

§ 324. *The Sheriff shall execute such writ without delay.*

The sheriff to whom the writ is directed and delivered shall execute the same without delay, and shall, unless the undertaking mentioned in the last section be given, attach and keep in his custody the steamer, vessel, or boat named therein, with its tackle, apparel and furniture, until discharged by due course of law; but the Sheriff shall not be authorized by any such writ to interfere with the discharge of any merchandise on board of such steamer, vessel, or boat, nor with the removal of any trunks or other property of passengers, or of the captain, mate, seaman, steward, cook, or other persons employed on board.

§ 325. *The owner, master, etc., may appear and defend such vessel.*

The owner, master, agent, or consignee of the steamer, vessel, or boat, against which the action is brought, may appear and answer, or plead to the action; and may except to the sufficiency of the sureties on the undertaking filed on the behalf of the plaintiff, and may require sureties to justify, as in actions against individuals upon bail on arrest.

§ 326. *Proceedings in actions under this chapter.*

All proceedings in actions under the provisions of this chapter shall be conducted in the same manner as in actions against individuals, except as otherwise herein provided: and in all proceedings subsequent to the complaint, the steamer, vessel, or boat may be designated as defendant.

§ 327. *After appearance, attachment may, on motion, be discharged.*

After the appearance to the action, of the owner, master, agent, or consignee, the attachment may, on motion, be discharged, in the same manner, and on like terms and condi.

tions, as attachments in other cases, subject to the provisions of section three hundred and twenty-nine.

1. The Court whose mesne or final process has made the first actual seizure of the thing must have exclusive power over its disposal, and the distribution of the fund arising therefrom; and the judgments of all other Courts, when properly authenticated and filed in the Court having custody of the fund, must be regarded as complete adjudications of the subject matter of litigation, and be entitled to distribution accordingly. *Averill v. Steamer Hartford*, 2 Cal. 306.

§ 328. *When not discharged, such vessel, etc., may be sold at public auction; application of the proceeds.*

If the attachment be not discharged, and a judgment be recovered in the action in favor of the plaintiff, and an execution be issued thereon, the Sheriff shall sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel, or boat, with its tackle, apparel, and furniture, or such interest therein as may be necessary, and shall apply the proceeds of sale as follows:

1st. When the action is brought for demands other than the wages of mariners, boatmen, and others employed in the service of the steamer, vessel, or boat sold, to the payment of the amount of such wages, as specified in the execution;

2d. To the payment of the judgment and costs, including his fees; and,

3d. He shall pay any balance remaining to the owner, master, agent, or consignee, who may have appeared in the action; or if there be no appearance, then into Court, subject to the claim of any party or parties legally entitled thereto.

§ 329. *Mariners and others may assert their claim for wages notwithstanding prior attachment; how enforced.*

Any mariner, boatman, or other person employed in the service of the steamer, vessel, or boat attached, who may wish to assert his claim for wages against the same, the attachments being issued for other (demands) than such wages, shall file an affidavit of his claim setting forth the amount and the particular service rendered, with the Clerk of the Court; and thereafter no attachment shall be discharged upon filing an undertaking, unless the amount of such claim, or the amount determined as provided in the next section, be covered thereby in addition to the other require-

ments ; and any execution issued against such steamer, vessel, or boat, upon judgment recovered thereafter, shall direct the application of the proceeds of any sale : *first*, to the payment of the amount of such claims filed, or the amount determined, as provided in the next section which the Clerk shall insert in the writ : and *second*, to the payment of the judgment and costs, and Sheriff's fees ; and shall direct the payment of any balance to the owner, master, or consignee who may have appeared in the action ; but if no appearance by them be made therein, it shall direct a deposit of the balance in Court.

§ 330. *Proof of the claim of mariners and others.*

If the claim of the mariner, boatman, or other person, filed with the Clerk of the Court, as provided in the last section, be not contested within five days after notice of the filing thereof by the owner, master, agent, or consignee of the steamer, vessel, or boat against which the claim is filed, it shall be deemed admitted ; but if contested, the Clerk shall indorse upon the affidavit thereof a statement that it is contested, and the grounds of the contest ; and shall immediately thereafter order the matter to a single referee for his determination, or he may hear the proofs and determine the matter himself. The judgment of the Clerk, or referee, may be (reviewed) by the County Judge either in term or vacation immediately after the same is given, and the judgment of the County Judge shall be final. On the review, the County Judge may use the minutes of the proofs taken by the Clerk, or referee, or may take the proofs anew.

1. Where the master of the vessel was in possession, and the record did not disclose any other owner, the admissions of the master were admissible in evidence with the same effect as if the suit had been against the master himself. *Bailey v. New World*, 2 Cal. 370.

§ 331. *Sheriff's notice of sale shall contain measurement, tonnage, etc.*

The notice of sale published by the Sheriff shall contain a statement of the measurement and tonnage of the steamer, vessel, or boat, and a general description of her condition.

§ 332. *Appeals may be taken from proceedings under this chapter.*

From orders and judgments under this chapter, an appeal may be taken by the owner, master, agent, or consignee, on the same terms and conditions as appeals in actions against individuals.

TITLE XXIX.

OF APPEALS IN CIVIL ACTIONS.

CHAPTER I.—*Appeals in general.*

- SECTION 333. Judgments and orders may be reviewed.
334. An order made out of Court, without notice, may be reviewed by the Judge who made it.
335. A party aggrieved may appeal in certain cases.
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341. Authentication of statement.
342. Statement shall be annexed to judgment roll or order appealed from.
343. Appeals from an order made upon affidavit.
344. On appeal from a judgment, the Court may review intermediate orders.
345. Remedial powers of the appellate Court.
346. Appellate shall furnish requisite papers.

§ 333. ¹*Judgments and orders may be reviewed.*^(a)

A judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this title, and not otherwise.

¹Amended 1854, 91.

§ 334. *An order made out of Court without notice may be reviewed by the Judge who made it.*

(a.) STATUTES OF 1861, p. 539,

An Act to regulate Appeals in this State. Approved May 30th, 1861.

SECTION 1. No distinction as to the mode of taking, or perfecting, appeals, or as to the effect of them, shall be made between cases at law and cases in equity; but the provisions of the Practice Act shall apply in the same manner to all cases of appeal.

An order made out of Court, without notice to the adverse party, may be vacated or modified, without notice, by the Judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made.

For definition of "judgment" and "order" see *ante*, § 144, *post* § 347, and § 515. See *post*, §§ 336, 347.

1. The provision made in section one hundred and eighteen, is not a substitution for the power conferred by this section. *Borland v. Thornton*, 12 Cal. 440. See *ante*, § 118, note No. 2.

§ 335. *A party aggrieved may appeal in certain cases.*

Any party aggrieved may appeal in the cases prescribed in this title. The party appealing shall be known as the appellant, and the adverse party as the respondent.

1. Where no appeal is allowed by law, the proper method to take a case to an appellate court is by writ of error. *Middleton v. Gould et al.*, 5 Cal. 190; *Haight v. Gay*, 8 Cal. 297.

2. Where an appeal was taken and perfected after the death of the appellant: *Held*, that there was no authority for prosecuting the cause in the name of the deceased, but that all proceedings should have been stayed until the executor or administrator could, by suggestion, have been made a party. *Sanchez v. Roach et al.*, 5 Cal. 248.

3. The husband has not the right of appeal in an action against the husband alone, involving the homestead right; the judgment could not affect the question of homestead. *Kraemer v. Revalk*, 8 Cal. 74.

4. In all cases where an appeal is given by the statute, that remedy is exclusive and must be pursued. *Haight v. Gay*, 8 Cal. 297.

5. A party aggrieved by a judgment has a right of appeal, although he is not a party to the record. *Adams v. Woods*, 8 Cal. 306.

6. Where a decree rendered in a suit against a corporation contained a direction for the sale of the interest of individuals not parties to the suit, and from such decree the corporation alone appealed: *Held*, that the corporation could not take advantage of the error in the decree in embracing individuals. *Dennis v. Table Mountain Water Co.*, 10 Cal. 369.

7. I. filed his bill in the District Court against T., alleging a partnership between them, and praying for an account of the partnership property. Subsequently I. filed a petition in the same Court, setting forth the bill, and also that L. T. B. and H. B. had obtained judgment against T. the defendant, and that execution had issued on the judgment, and was levied on the partnership property of the plaintiff and defendant. and that the sheriff was about to sell the property. The petition prayed that L. T. B. and H. B. might be made parties, and that an injunction might issue against L. T. B. and H. B. and the sheriff. *Held*, that on the appeal of the case to this Court, it does not lie in the mouth of I. and T. to say that L. T. B. and H. B. are not parties to the suit, and have no right of appeal. *Jones v. Thompson et al.*, 12 Cal. 191.

8. The party aggrieved, entitled to appeal within the meaning of the three hundred and thirty-fifth section of the Practice Act, is the party against whom an appealable order or judgment has been entered; and when an order is made directing an injunction upon condition that an undertaking be executed and filed, the party against whom the order is made may appeal at once, without waiting until the injunction has issued. *Ely v. Frisbie*, 17 Cal. 250.

9. When a party is made a defendant in an action and a decree taken against him, from which he appeals, the appeal will not be dismissed because he has no interest in the subject matter of the suit. *Ricketson v. Compton*, 23 Cal. 636.

10. When an appeal is taken from a judgment, and the judgment is reversed

by the Supreme Court, with directions to the Court below to enter a judgment in accordance with the opinion, and the Court below renders judgment accordingly, from which a second appeal is taken, the second appeal will not be dismissed, on motions, for said reasons, but they may be good grounds for affirming the judgment. *Id.*

11. A judgment will not be reversed because of an error which affects the rights of parties who have not appealed, and not those of the appellants. *Speyer v. Ihmels*, 21 Cal. 280.

12. The fact that an appellant has resided out of the State several years, is no ground for denying him the right to appeal from a judgment rendered against him. *Ricketson v. Compton*, 23 Cal. 636.

13. As to the right of appeal, there is no distinction between judgments by default and judgments after issue joined and a trial. *Hallock v. Jaudin*, Oct. T. 1867.

§ 386. ¹ *Within what time appeal may be taken. (a)*

An appeal may be taken :

First—from a final judgment in an action or special proceeding commenced in the Court in which the same is rendered, within one year after the rendition of the judgment.

Second—From a judgment rendered on an appeal from an inferior Court, within ninety days after the rendition of such judgment.

Third—From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from any special order made after final judgment; and from an interlocutory judgment in actions for partition of real property, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the Court.

¹Amended statutes, 1851, 94; 1859, 140; 1863, 756; 1864, 223; 1866, 706. For definition of "judgment and order," see *ante*, § 144; *post*, § 347. See *post*, § 347, for decisions relating to the subject of appeals generally.

1. **Notes under first subdivision.**—The one year within which to appeal from a judgment commences to run at the time the Court announces its judgment, and the order for judgment is entered in the minutes, and not at the time the clerk enters the judgment in the judgment book. *Genella v. Rejya*, 32 Cal. 159. See *ante*, § 195, note No. 25.

(a) *An Act relating to appeals in partition.*

SECTION 1. In addition to appeal provided for by section 336 of an act to regulate proceedings in civil cases in the Courts of justice of this State, passed April 29, 1851, an appeal may be taken from the judgment or decree of the Court in cases of partition, which determines the right of the several parties and directs partition to be made; provided that upon the filing the bond mentioned in section 347 of an act entitled an act to regulate proceedings in civil cases, passed April 29, 1851, all proceeding in the case pending the appeal shall be stayed.

Statute 1864, 223.

2. The question whether an appeal from a judgment should not be taken, within one year from the time when the order for judgment is made and entered in the minutes of the Court, discussed. *Gray v. Palmer*, 28 Cal. 416.

3. An appeal from a judgment must be taken within one year from the time of its rendition. The failure of the clerk to enter the judgment in the judgment book at the time it is rendered cannot extend the time within which to appeal. *Id.*

4. Where an order for judgment has been made and regularly entered by the clerk in the minutes of the Court, and the judgment has been drawn up in form, signed by the Judge, and filed with the clerk, final judgment has been rendered within the meaning of the terms "rendition of the judgment," as used in section three hundred and thirty-six of the Practice Act, and the time for taking an appeal commences to run. *Id.*

5. The one year within which an appeal must be taken from a final judgment, commences to run from the time judgment is rendered by the Court, and not from the time it is entered in the judgment book by the clerk. *Gray v. Palmer*, 28 Cal. 417, affirmed; *Peck v. Courtis*, 31 Cal. 207.

6. Where an appeal is dismissed for want of a proper bond, and no final judgment has been rendered, an appeal can be taken at any time within the period allowed by law. *Martinez v. Gallardo*, 5 Cal. 155.

7. An appeal from an order refusing a new trial, although taken more than one year after the rendition of judgment, brings up the whole record; and the Supreme Court, if satisfied that the Court below erred in refusing a new trial, may reverse the order and grant a new trial, the effect of which will be to vacate the judgment. *Walden v. Murdock*, 23 Cal. 540.

8. Notes under second subdivision.—Appeals from an inferior Court must be made within ninety days. *Dooling v. Moore*, 20 Cal. 141.

9. Notes under third subdivision.—After appealing from a judgment alone, a party may appeal from an order overruling a motion for a new trial in the same case, provided the latter appeal is taken in time. *Marsiou v. Pioche*, 8 Cal. 522.

10. Where an appeal is taken in the same notice, both from a final judgment and an order refusing a new trial, after sixty days from the entry of the order for a new trial, the appeal, so far as the order is concerned, will on motion be dismissed. *Lover v. Knox*, 10 Cal. 480.

11. An appeal from an order denying a new trial must be taken within sixty days after the order is made and entered in the minutes of the Court. *Peck v. Vandenberg*, 30 Cal. 11; *Peck v. Courtis*, 31 Cal. 207.

12. A party should appeal, if aggrieved, from an order granting a new trial during the time allowed by the statute, and cannot, after taking his chances upon a second trial, rely on the fact as error. *Brown v. Tolles*, 7 Cal. 398.

13. The questions discussed in the opinion as to the time within which appeals must be taken from various orders. *Gray v. Palmer*, 28 Cal. 416.

14. Where the notice of appeal from an order overruling a motion for new trial has not been filed within sixty days from the entry of the order, the appeal will be dismissed. *Towdy v. Ellis*, 22 Cal. 650.

15. An order made by the court on a motion is a final adjudication upon the subject matter, unless appealed within statutory time; nor can the statutory time for appeal be extended by subsequent renewal of the motion, even if it be varied in its terms, provided it is substantially the same motion. *Kittredge v. Stevens*, 23 Cal. 283.

§ 337. Appeal shall be made by filing and serving notice thereof.^(a) (b)

(a) STATUTES OF 1856, 26.

SECTION 1. When judgment has been rendered in the Court of a Justice of the Peace, in a County Court, a District Court, or the Superior Court of the city of San Francisco, against any organized or incorporated city or town in this State, said city or town, or county, against which such judgment was rendered may appeal therefrom to any Court of competent jurisdiction, by filing a notice of appeal with the said Justice of the Peace or clerk of either of the

The appeal shall be made by filing with the Clerk of the Court, with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney.

See note, No. 42, *post*, § 346. Bancroft's Forms, 484.

1. Where the object of a notice of appeal is accomplished, it is immaterial whether the notice is given or not. *McLeran v. Shartzer*, 5 Cal. 70. Where both parties appear, no notice whatever is necessary to be shown. *Id.* See *post*. No. 10.

2. **Notice of appeal.**—If there is enough in the notice of appeal to show that the notice and order contained in the transcript are the same intended to be appealed from, the appeal will not be dismissed, although the notice may contain mistakes as to the date of the order or judgment. *Plateau v. Lubeck*, 24 Cal. 364. The place for assignment of error is in the statement, and not in the notice of appeal. *Burnett v. Pacheco*, 27 Cal. 409.

3. When a notice of appeal to the Supreme Court is signed by an attorney of the Court, the presumption is that he had authority to take such action. *Rickelson v. Compton*, 23 Cal. 636.

4. Respondent filed a notice of motion to dismiss an appeal on the ground that the notice of appeal was filed after service, and afterwards on the same day made a motion to continue the cause for the term. *Held*, no waiver of insufficiency of the notice of appeal. *James v. Williams*, Jan. T. 1866.

5. A notice appealing from all orders made by a Probate Court in the case on a certain day, is sufficient to cover any appealable order made on that day. *Estate of Pacheco*, 29 Cal. 224.

6. **Filing notice of appeal.**—The filing of a notice of appeal must precede or be contemporaneous with the service of a copy of the notice on the adverse party. *Buffendeau v. Edmondson*, 24 Cal. 94; *Boston v. Haynes*, 31 Cal. 107; 30 Cal. 527; *Foy v. Domec*, Oct. T. 1867.

7. A stipulation that no execution shall issue until the determination of the appeal, is not a waiver of an objection that the notice of appeal was not filed in season. *Moulton v. Elmaker*, 30 Cal. 527.

8. Where a notice of appeal to the Supreme Court and undertaking were filed in the clerk's office on the 16th day of December, and on the next day a copy of the notice was served on the respondent, who, within five days after filing the undertaking, excepted to the sufficiency of the sureties to the undertaking: *Held*, that the respondent was not injured by the failure of the appellant to serve a copy of the notice of appeal on the day the undertaking was filed. *Mokehunnne Hill Co. v. Woodbury*, 10 Cal. 185.

9. The filing of a notice of appeal must precede the filing of the undertaking on appeal. Until an appeal is taken there is nothing to give effect to the undertaking. *Buckholder v. Byers*, 10 Cal. 481; affirmed in *Dooling v. Moore*, 19 Cal. 81.

Courts as above mentioned, and serving a copy thereof on the opposite party or his attorney, within the time and manner provided for appeals in other cases; and said appeals shall be effectual for all purposes, and shall operate as a supersedeas to any execution that has been or may be issued on said judgment without the filing of a bond or the payment of costs to the Justice or other Courts by the said city, or town, or county so appealing.

SEC. 2. The mayor, attorney, or chief officer of any city, or district attorney or the president of the board of supervisors of any county, shall have power to give the notice herein required to be given, and to perfect such appeal on behalf of their respective corporations or counties.

(b) STATUTES 1861, p. 589, chap. 522.

SEC. 3. No appeal shall be dismissed for insufficiency of the notice of appeal or undertaking thereon; provided, that a good and sufficient undertaking, approved by a Judge of the Supreme Court, be filed in the Supreme Court before the hearing upon motion to dismiss the appeal, and upon the payment of such reasonable cost as the Court may adjudge; provided, that the respondent shall not be delayed, but may move when the cause is regularly called for the disposition or dismissal of the same, if such undertaking be not given.

10. The filing of a notice of appeal in the Court below, and service of a copy of the same upon the opposite party, or his attorney, is indispensable in order to enable the appellate Court to acquire jurisdiction of the cause. *Bonds v. Hickman*, 29 Cal. 460.

11. When the record shows that a notice of appeal was served on the respondent's attorney the same day that it was filed by the clerk, and the indorsement of the filing precedes the indorsement of admission of service, the inference is that the filing preceded the service. *Wright v. Ross*, 26 Cal. 262.

12. If the notice of appeal is served on respondents' attorney, and immediately afterwards filed by the clerk, the service and filing will be regarded as one act. *Id.*

13. When the record shows that the notice of appeal was filed and served on the same day, and the indorsements indicate that the notice was first filed and then served, it is doubtful whether affidavits can be received to show that the service preceded the filing. *Id.*

14. Affidavits will not be received in the Supreme Court to show that a notice of appeal was filed on a different day from that stated in the record. *Boston v. Haynes*, 31 Cal. 107.

15. If an undertaking on appeal is filed before the notice of appeal is filed and served, the appeal will be dismissed on motion. *Carpentier v. Williamson*, 24 Cal. 609.

16. An appeal is made by filing and serving the notice of appeal. Both requisites must exist to complete the appeal. A failure to notify the adverse party is fatal. *Whipley v. Mills*, 9 Cal. 641.

17. To constitute an appeal there are three things necessary: first, filing the notice; second, service of the same; and third, filing the undertaking. All of these steps must be taken within the times limited by the statute. If not so taken, there is no appeal perfected, and this Court has no jurisdiction of the case. *Hastings v. Halleck et al.*, 10 Cal. 31.

18. An appeal will be dismissed where the notice of appeal has been filed ten days after it was served. *James v. Williams*, Jan. T. 1866.

19. The filing of a notice of appeal must precede the service. *Lynch, administrator, v. Dunn*, Jan. T. 1868.

20. **Serving notice of appeal.**—Service of a notice of appeal upon the opposite attorney is always sufficient. *Coulter v Stark*, 7 Cal. 244.

21. An appeal will be dismissed on motion, if a copy of the notice of appeal is served on the opposite party before the day on which the original is filed in the clerk's office. *Buffendeau v. Edmondson*, 24 Cal. 94.

22. Unless it affirmatively appear in the record that a copy of the notice of appeal is served on the adverse party, or his attorney, the Supreme Court cannot take jurisdiction of the case. *Hildreth v. Gwindon*, 10 Cal. 490.

23. A copy of the notice of appeal filed must be served on the opposite party before or at the time of filing the undertaking. The third section of the act of 1861, entitled "an act to regulate appeals in this State," was intended to relieve appellant from defects of form and deficiencies in substance apparent on the face of notices of appeal. *Buffendeau v. Edmondson*, 24 Cal. 94.

24. When the notice of appeal has been properly served, whether by personal or substituted service, the appellant, upon the hearing of the respondent's motion to dismiss the appeal on the ground that there is no proof of service, or that the proof is defective, may move for leave to supply the omitted proof. Upon leave being granted, the appellant may file in the Court below the requisite affidavit, or official certificate of service, and a certified copy thereof may be annexed to the record in this Court. This proof may be made and the certified copy procured before the hearing of the respondent's motion, when there is sufficient time after the defect is discovered. *Moore v. Besse*, April T. 1868.

25. **Proof of service of notice.**—Service of a notice of appeal may be proved by the affidavit of a third person. *Id.*

26. An acknowledgment of service, indorsed on a notice of appeal, as follows: "due service of a copy of the within notice is hereby accepted to have

been made this twentieth day of February, 1863," is no waiver of an objection that service upon the day mentioned is too late. *Towdy v. Ellis*, 22 Cal. 650.

27. An affidavit of service of a notice of appeal on the respondent's attorney, if it does not show a personal service, must state that the notice was left in his office with his clerk, or with a person having charge thereof, or that no person was in the office, and that the notice was left there in a conspicuous place, between the hours of eight in the morning and six in the afternoon. *Doll v. Smith*, 32 Cal. 475.

§ 338. *The appellant shall within twenty days prepare statement, subject to amendment and settlement.*

When the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he shall, within twenty days after the entry of such judgment or order, prepare such statement, which shall state specifically the particular errors or grounds upon which he intends to rely on the appeal, and shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and no more, and shall serve a copy thereof upon the adverse party. The respondent may, within five days thereafter, prepare amendments to the statement, and serve a copy on the appellant. The statement and amendments which may be served shall be presented to the Judge who tried or heard the case, upon notice of two days to the respondent, and a true statement shall thereupon be settled by such Judge. If no amendments are served, the statement may be presented to the Judge for settlement without any notice to the respondent.

¹Amended statute, 1863, 644.

1. **Statement must be filed within twenty days.**—Where a statement, to be used on appeal, is not filed within twenty days after judgment, it cannot be regarded, and the case will be determined on the judgment roll alone. *Macomber v. Chamberlain*, 8 Cal. 322; *Tufferty v. Brownlee*, 11 Id. 132; *Heiken v. Stansburg*, 12 Id. 412; *McIntyre v. Willis*, Jan. T. 1862.

2. Moving for a new trial does not of itself operate to extend the time for filing a statement on appeal from the judgment. And where a judgment was rendered July 27th, 1859, and motion for new trial overruled October 22d, 1859, a statement on appeal served November 10th, 1859, was not in time. *Mahoney v. Caperton*, 15 Cal. 313.

3. If the party who appeals from a judgment does not file and serve a statement on appeal within twenty days from the entry of the judgment, his right to make a statement is waived. *Ryan v. Dougherty*, 30 Cal. 218; *Harper v. Minor*, 27 Cal. 109.

4. **Time to file may be enlarged.**—See *post*, § 340.

5. **Rules to be observed in the preparation of a statement on appeal.**—As will be seen by referring to the amendment indicated of 1864, it is not necessary in all cases to bring up the entire judgment roll. In this case, the original pleadings and summons might have been omitted, as no question arises on them. The amended complaint and answer thereto formed the

issues tried. It is sufficient, when the style of the court and title of the cause is given in the first paper, to afterward give the name of the document, and at the head say, "title of cause;" and where a paper is verified or acknowledged, to say "duly verified," or "duly acknowledged." The date of the paper, date of filing, date of service, etc.—the rest may with advantage be omitted. *Marriner v. Smith*, 27 Cal. 654.

6. But the transcript should always contain enough of the record of the Court below to fully present the question, and show the materiality of the point relied on to reverse the judgment or order; and generally, whenever a pleading or other paper has been necessarily used on the hearing of the Court below, a copy of the pleading or an agreed statement of the contents of so much, at least, as is relevant to the point in issue, should be furnished in the transcript. *McQuade v. Whaley*, 29 Cal. 614.

7. The statement on appeal should contain only such orders and rulings as the appellant desires to have reviewed, and the facts necessary to explain the action of the Court below thereon. *Harper v. Minor*, 27 Cal. 107.

8. **Pleadings.**—Attorneys may agree as to the contents of the pleadings, and introduce into the transcript such agreement, instead of printing the entire pleadings. [This course should be pursued in all cases where no point is made on them.] *McQuade v. Whaley*, 29 Cal. 612.

9. **Statement to review questions of law arising during the trial.**—An appellant who does not wish to raise any question in the appellate Court as to the sufficiency of the evidence, may have questions of law arising in the progress of the trial reviewed by making a statement of such ruling, with sufficient evidence to show their materiality, or may embody them in a bill of exceptions, and in this way have them reviewed on appeal from the judgment. *Harper v. Minor*, 27 Cal. 109.

10. Where there is no controversy as to any material fact, and the action of the Court below is sought to be reviewed on questions of law alone, a statement on appeal is not only a proper method, but is often the most convenient, expeditious and economical mode of bringing the alleged errors before the Supreme Court. *Treadwell v. Davis*, April T. 1868.

11. **Statement.**—When an appeal is taken from an order made upon other evidence, either alone or in connection with affidavits, much of it often consists of documents not filed, judgment rolls and files in other cases, which are not and cannot be made a part of the files in the case heard. Questions of admissibility of evidence, etc., may arise. A convenient way of making so much of these as is necessary, to present the legal points contested a part of the record, is by statement, and that method is accordingly adopted, and no other is provided. *Haggin v. Clark*, 28 Cal. 162. See also *Abbott v. Douglass*, 28 Cal. 299; *Hutton v. Reed*, 25 Id. 479; *Harper v. Minor*, 27 Id. 107, for the reasons for adopting this mode of making statements. *Wetherbee v. Davis*, Oct. T. 1867.

12. **Statement, intermediate orders.**—If the appellant desire to have any intermediate orders, not forming a part of the judgment roll, reviewed on an appeal from a judgment, he must bring them into the record by means of a statement, together with such facts forming the basis of the orders as are necessary to explain the action of the Court below. *Harper v. Minor*, 27 Cal. 109.

13. When a notice of motion to dismiss a complaint on specified grounds is given, to obtain a review of the order made on the motion, the record must disclose the papers read or the evidence offered in their support. *Freeborn & Goodwin v. Glaser*, 10 Cal. 337.

14. When the transcript consists of the pleadings, several affidavits, and memoranda of exceptions taken in the progress of a cause, and signed by the Judge, stating that certain motions were made on the one side upon affidavits, and resisted on the other, together with the rulings of the Court and the exceptions of counsel, but containing nothing which identifies the affidavits in the transcript as those upon which the motions were made, or which enables this Court to determine the correctness of the rulings below. *Held*, that

the orders cannot be brought up for review on appeal from a final judgment in this way. *Stone v. Stone*, 17 Cal. 513.

15. A regular statement must in such case be prepared according to the statute, embracing so much of the affidavits or evidence upon which the rulings were had as to explain and point the exceptions taken; and the memoranda of exceptions signed by the Judge in the progress of the cause serve only to secure accuracy in the statement. *Id.*

16. **Specification of grounds of error.**—If on appeal from an order, made after judgment, the statement contains facts outside the record and affidavits, it should specify the grounds upon which appellant will rely. *Leffingwell v. Griffing*, 29 Cal. 192.

17. In an appeal from an order, made after final judgment, if appellant makes a statement, and relies upon it in the appellate Court, the statement must contain the grounds upon which appellant intends to rely on appeal, or it will be disregarded. *Haggin v. Clark*, 28 Cal. 162.

18. A statement on appeal must specify the grounds on which the appellant relies. The questions of law and facts raised must be distinctly set forth, accompanied with only so much of the evidence as may be necessary to show their pertinency and materiality. *Barrett v. Tewksbury* 15 Cal. 354.

19. Where a statement on appeal contains no specification of grounds explaining the several points of objection set forth in a general way in the notice of motion, the defect is not cured by the assignments in the exceptions taken to the findings. *Harper, admin'r, v. Minor*, Oct. T. 1865.

20. **Settlement of statement.**—The place to object to immaterial matter in a statement is where it is made up and settled. If immaterial matter is introduced, and that fact is made to appear in the records, the party insisting on its introduction will be taxed with the costs of the immaterial matter. *Kimball v. Semple*, 31 Cal. 657.

21. **When a settlement is waived.**—If a statement on appeal is served and filed within the time required by the three hundred and thirty-eighth section of the Practice Act, unless the respondent within five days thereafter prepares and serves amendments, he is deemed to have agreed to the statement, and no settlement thereof or certificate of the Judge is necessary. *Connor v. Morris*, 23 Cal. 447.

22. **When no statement is required on appeal.**—It is only where an appealable order is made upon affidavits, and an appeal is taken directly from such order, that a statement is not required. But even then there must be some certificate of the Judge or clerk specifying the affidavits used. *Stone v. Stone*, 17 Cal. 513.

23. No statement of the grounds of appeal is required, on appeal from judgment. *Solomon v. Reese*, Oct. T. 1867.

24. In an appeal taken from an order made after the final judgment, upon affidavits filed, it is not necessary to make a statement, nor is it necessary to specify the grounds upon which the appellant will rely for a reversal of the order. *Haggin v. Clark*, 28 Cal. 162.

25. **If there is no statement on appeal, no specification of errors is required.** *Burnett v. Pacheco*, 27 Cal. 409.

26. **Statement on appeal from probate courts.**—Section three hundred and thirty-eight of the Practice Act, prescribing what statements on appeal shall contain, applies to statements made on appeal from the Probate Courts. *Estate of Boyd*, 25 Cal. 512.

27. If a statement on appeal from the Probate Court does not state specifically the particular errors or grounds upon which the appellant intends to rely, and the appeal rests on the statement alone, the appeal will be dismissed on motion of the respondent. *Id.*

28. **Statement filed on motion for a new trial may be used on appeal from the judgment.**—See *ante*, § 193, No. 222.

39. **Statement on appeal**—If there is nothing in the statement showing that it is a statement on motion for a new trial, and the statement declares that the motion for a new trial was overruled, it will be regarded as a statement on appeal. *Hagar v. Lucas*, 29 Cal. 309.

30. [See further concerning the rules relating to the preparation of statements, under § 195. Also examine the notes under §§ 193 and 245, as to the remedial powers of the Supreme Court, and the decisions bearing upon the subject of new trials, remedies, etc. See also the rules of the Supreme Court, and the decisions thereunder to be found in the appendix.]

§ 339. *'Omission to make statement or amendment according to preceding section shall be a waiver thereof.*

If the party shall omit to make a statement within the time above limited, he shall be deemed to have waived his right thereto; and when a statement is made, and the parties shall omit within the several times above limited, the one party to propose amendments, the other to notify an appearance before the Judge, they shall respectively be deemed, the former to have agreed to the statement as prepared, and the latter to have agreed to the amendments as proposed, but the Judge who heard the cause shall, notwithstanding such omission or implied agreement, have power to correct any misstatement of facts or of his rulings which such statement may contain.

¹Amended Statutes 1855, 303; 1863, 644.

1. If a statement is served and filed within the time required by the three hundred and thirty-eighth section of the Practice Act, unless the respondent, within five days thereafter, prepares and serves amendments, he is deemed to have agreed to the statement; and no settlement thereof or certificate of the Judge is necessary. *Conner v. Morris*, 23 Cal. 447.

2. If the statement on appeal from a judgment is not served on the respondent's attorney until more than twenty days after the rendition of judgment, and no extension of time is obtained, a statement is waived, and the appellate Court cannot review any alleged errors except such as appear in the judgment roll. *Kavanagh v. Mans*, 28 Cal. 261.

3. If no amendments to a statement on appeal are served on the appellant, it may be settled by the Judge without notice to the respondent, but it should be authenticated either by the certificate of the Judge or by the stipulation of the parties. *Id.*

4. If a statement on appeal is not filed and served in time, the opposite party does not waive the default by not returning to appellants' attorney the copy of the statement served on him. *Bryan v. Maume et al.*, 28 Cal. 238.

5. If the party who appeals from a judgment does not file and serve a statement on appeal within twenty days from the date of the judgment, his right to make a statement is waived. *Harper v. Minor*, 27 Cal. 108.

§ 340. *Time for preparing statement or amendment may be enlarged.*

The several periods of time above limited may be enlarged, upon good cause shown by the Judge before whom the cause was tried.

1. If the appellant allow the twenty days to expire after taking the appeal without framing a case, he waives his right to have a case stated; and a subsequent order of the Court, made without notice to the respondent, allowing further time to make up the statement, is a nullity. *Leach v. Allan*, 2 Cal. 95.

2. The Court may extend the time for filing a statement on appeal; but moving for a new trial will not extend the time. *Mahoney v. Caperton*, 15 Cal. 313; see *Harper v. Minor*, 27 Id. 108; *Bryan v. Maume*, 28 Id. 238; and § 338, note Nos. 1-3.

3. Time may be extended thirty days without the consent of adverse party. *Bryan v. Maume*, 28 Cal. 238.

4. If the appellant obtains an order extending the time to make a statement on appeal more than thirty days beyond the time allowed by law, the opposite party does not consent to such order by not making any objection thereto. *Id.*

5. An order extending the time for appellant to file a statement on appeal more than thirty days beyond the twenty days allowed by law, is good for the thirty days without the consent of the other party. *Id.*

§ 341. Authentication of statement.

The statement, when settled by the Judge, shall be signed by him, with his certificate that the same has been allowed and is correct; when the statement is agreed upon by the parties, they or their attorneys shall sign the same with their certificate that it has been agreed upon by them, and is correct. In either case, when settled or agreed upon, it shall be filed with the Clerk.

See § 195, *ante*, Nos. 77-99, "Authentication of Statement."

1. **Settlement and authentication of statement.**—The statute does not require the board of equalization to take down or preserve the evidence taken before them, nor does it make any provision for settling a statement of a trial before them, or a bill of exceptions taken during its progress; but doubtless some mode might be adopted to authenticate the evidence when required on appeal. *Central Pacific Railroad Co. v. Placer County*, 32 Cal. 582.

2. If a statement on appeal is served and filed within the time required by the three hundred and thirty-eighth section of the Practice Act, unless the respondent within five days thereafter prepares and serves amendments, he is deemed to have agreed to the statement, and no statement thereof or certificate of the Judge is necessary. *Connor v. Morris*, 23 Cal. 447.

3. If a statement in the transcript is not authenticated, and the appellant afterwards brings up a certified but defective statement, he will not be allowed to use the second statement in connection with portions of the first as the statement in the case. *Kimball v. Semple*, 31 Cal. 657.

4. **Certificate of the judge or attorneys.**—The statement of facts should be signed in all cases by the Judges, except when agreed to by the parties or their attorneys. *Hurley v. Young*, 4 Cal. 284.

5. An appeal can be heard upon a bill of exceptions taken at the trial, if signed by the Judge. *Johnson v. Sepulveda*, 5 Cal. 149.

6. A Judge can revoke his certificate to a settled statement on appeal, during the term at which the judgment was rendered; but after the term has expired it cannot be done. *Branger & Driard v. Chevalier*, 9 Cal. 351.

7. A statement on appeal is sufficient, when the Judge certifies that it is substantially correct. It is not necessary that the testimony should be stated in the precise words of each witness. *Battersby v. Abbott*, 9 Cal. 565.

8. It is no objection that the statement does not affirmatively show that the settlement was upon proper notice, or in the presence of both parties. In the absence of evidence to the contrary, the presumption of law is in favor of the regularity of all official acts. *Id.*

9. Nor do affidavits used on motion to open the judgment form any part of the record, where there is no certificate of the Judge or clerk, or an admission of counsel that they were used for that purpose. *Ritter v. Mason*, 11 Cal. 214.

10. A statement, which was filed in the Court below, on motion for a new trial, and is neither agreed to by counsel nor settled by the Judge trying the case, has not sufficient authentication to constitute any portion of the record which this Court can notice. *Doyle v. Seawall*, 12 Cal. 425.

11. And a certificate of the Judge who tried the cause, made eight years after the trial, that he believed the exceptions taken were correctly noted in the clerk's minutes of the testimony, cannot supply the place of a bill of exceptions. *Castro v. Arnesti*, 14 Cal. 38.

12. A statement on appeal, certified by the Judge to be correct according to his recollection, is not sufficient. *Van Pelt v. Littler*, 14 Cal. 194.

13. Where documents and depositions are read or referred to, on the arguments of a motion for a new trial in the Court below, and are not embodied in the statement, it will be sufficient for the Judge to add, upon rendering his decision, a certificate of the matters thus read or referred to. This certificate will be sufficient identification of the documents and depositions used; and a copy of them, together with the statement and judgment roll, will constitute the only record necessary in the Supreme Court. *Loucks v. Edmondson*, 18 Cal. 203.

§ 342. *'Statement shall be annexed to judgment roll or order appealed from.*

A copy of the statement shall be annexed to a copy of so much of the judgment roll as shall be included in the transcript on appeal, if the appeal be from a judgment; if the appeal be from an order, to a copy of such order.

¹Amended statute 1864, 247.

§ 343. *'Appeal from an order made upon affidavit.*

The provisions of the last five preceding sections shall not apply to appeals taken from an order made upon affidavit filed, but such affidavits shall be annexed to the order in the place of the statement mentioned in those sections.

¹Amended statute 1854, 91.

1. It is only where an appealable order is made upon affidavits and an appeal is taken directly from such order, that a statement¹ is not required. But even then, there must be some certificate of the Judge or clerk specifying the affidavits used. *Stone v. Stone*, 17 Cal. 513.

2. In an appeal taken from an order, made after final judgment, upon affidavits filed, it is not necessary to make a statement, nor is it necessary to specify the grounds upon which the appellant will rely for a reversal of the order. *Haggin v. Clark*, 28 Cal. 162.

3. In an appeal from an order made after final judgment, if appellant makes a statement and relies upon it in the appellate Court, the statement must contain the grounds upon which the appellant intends to rely on appeal, or it will be disregarded. *Id.*

4. Affidavits filed by a defendant in opposition to an application for an injunction made upon the complaint alone, are part of the record, and upon appeal from the order may be considered, although not embraced in the statement. *Gagliardo v. Crippen et al.*, 22 Cal. 362.

5. On an appeal from an order made on affidavits filed, no statement is

necessary. The affidavits must be annexed to the order in place of a statement, and the certificate of the clerk should specify the affidavits used, and, to enable him to do so, he should at the time mark them as filed on the motion. *Paine v. Linkill et al.*, 10 Cal. 370.

§ 344. *On appeal from a judgment the Court may review intermediate order.*

Upon an appeal from a judgment, the Court may review any intermediate order involving the merits, and necessarily affecting the judgment.

1. Section three hundred and forty-four of the Practice Act, relating to a review of intermediate orders upon an appeal from a final judgment, relates to such intermediate orders only as are in themselves non-appellable. *Hika v. Peck*, 30 Cal. 280.

2. Interlocutory orders made in the progress of a trial will not be reviewed in the appellate Court, unless they are embodied in a statement or bill of exceptions. *Abbott v. Douglass*, 28 Cal. 295.

3. On an appeal from a final judgment, the Court cannot review an order refusing to dissolve an attachment. *Allender v. Fritts et al.*, 24 Cal. 447.

4. The District Court cannot review an order granting a nonsuit upon a motion to set aside the nonsuit. *Levy v. Getteson*, 27 Cal. 686.

5. An order denying a motion to re-tax costs should be reviewed by an appeal from the judgment, and annexing a statement to the judgment roll. *Id.*

§ 345. *Remedial powers of the Appellate Court.*

Upon an appeal from a judgment or order, the Appellate Court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties; and may set aside or confirm, or modify any or all of the proceedings subsequent to or dependent upon such judgment or order, and may, if necessary or proper, order a new trial. When the judgment or order is reversed or modified, the Appellate Court may make complete restitution of all property and rights lost by the erroneous judgment or order; and when it appears to the Appellate Court that the appeal was made for delay, it may add to the costs such damages as may be just.

See N. Y. Code, § 330.

1. **When the judgment will be affirmed.**—To disturb a judgment of a Court of original jurisdiction, it is not sufficient that error may have intervened, but it must be affirmatively shown by the record. *White v. Abernathy*, 3 Cal. 426.

2. Errors which are immaterial, and do not affect the substantial rights of the parties, are unavailing on appeal, even when the subject of the exception; much less so when they are permitted without objection. *Paige v. O'Neal*, 12 Cal. 483.

3. An order by the Court below, granting a new trial, will not be disturbed where the statement on appeal consists of a mere outline of the evidence, without any rulings and instructions of the Court—the statement not purporting to

give all the testimony, and that given not being so clearly in favor of the verdict as to justify any interference with the order. *Loucks v. Edmondson*, 18 Cal. 203.

4. A Court of review will not reverse the judgment of an inferior tribunal for errors committed in excluding evidence if the evidence excluded is contained in the record, and it appears that the party complaining would not have been entitled to recover if the evidence had all been admitted. *Susana Martinez De Marle v. H. Mathews et al.*, 26 Cal. 455.

5. A judgment will not be reversed because of the admission of irrelevant testimony, where no substantial right of the party was prejudiced thereby. *Henry v. Everts*, 30 Cal. 425.

6. A judgment will not be reversed on account of error in admitting improper evidence upon a point immaterial to the decision. *Kidd v. Teeple*, 22 Cal. 255.

7. When a judgment is correct by the record, it will be affirmed without reference to the grounds upon which it was rendered by the Court below. *Id.*

8. Where, on appeal from an order granting a new trial, the record shows that the motion was made upon several grounds, without showing upon which of them the action of the Court below was based, the order will not be reversed if it was within the discretion of the Court to make it upon any of the grounds stated. *Oullahan v. Starbuck*, 21 Cal. 413.

9. When the case made by plaintiff's proof differs from the averments of the complaint, and defendant makes no objection to the introduction of the evidence on this ground, the Supreme Court will not reverse the judgment on account of the variance. *Marshall v. Ferguson* 23 Cal. 65.

10. If the decision of the Court below was correct when it was made, the appellate Court will not reverse the judgment by reason of any matter of fact which was not shown or offered in the Court below. *Wallace v. Eldredge*, 27 Cal. (No. 2) 498.

11. A judgment will not be reversed because an error has intervened in the course of a trial, which does not prejudice the defendant's cause. *Boyce v. California Stage Co.*, 25 Cal. 473.

12. A judgment will not be reversed for an error favorable to the appellant. *Wilkinson v. Parrott*, 32 Cal. 102.

13. Where an action is commenced against a person alleged to be the owner of real estate, and the real estate, to recover judgment for taxes assessed on the same, and the Court finds as a fact that the person sued is not the owner of the real estate, and renders judgment in his favor, but against the real estate, and an appeal is taken by the person made defendant from the judgment in his favor, but not from the judgment against the real estate, he cannot assign as error any proceedings which affect the real estate, and as the judgment does not injuriously affect him, it will be affirmed. *People v. Wilson*, 26 Cal. 127.

14. Where the findings in a case tried by the Court do not contain all the facts necessary to be proved in order to be entitled the prevailing party to a judgment, it will not be reversed on appeal, unless the Court below has, after the defect has been pointed out, failed or refused to make the required finding, and an exception has been taken thereto. *Lyons v. Leimback*, 29 Cal. 139.

15. If the complaint on an official bond avers the due execution of the same by both principal and sureties, and the answer takes issue on the averment, verdict and judgment are for plaintiff, the judgment will not be disturbed on appeal upon the judgment roll on the ground that what purports to be a copy of the bond annexed to the complaint does not contain the signature of the principal. *Mendocino County v. Morris*, 32 Cal. 145.

16. A judgment will not be reversed on account of error in the record if the appellant can gain nothing by a new trial. *Larco v. Casaneuva*, 30 Cal. 560.

17. If the Court below finds damages in an action to recover lands, but gives judgment for possession only, and the appellate Court determines that the finding is not sustained by the evidence, the judgment, on an appeal by both parties, will be affirmed, if the plaintiff releases his claim for damages. *Carpenter v. Gardiner*, 29 Cal. 160.

18. When judgment will be reversed, generally.—If illegal testimony is admitted by the Court below, and the appellate Court cannot determine whether the finding of the Court below was based on this or other testimony in the case, the judgment will be reversed. *Roff v. Duane*, 27 Cal. 568.

19. If the plaintiff admits on the pleadings that he never had cause of action against the defendant, the Supreme Court will reverse a judgment in his favor, and may either order a judgment in defendant's favor in the Court below, or may remand the cause for further proceedings. *Mulford v. Eschelle*, 32 Cal. 131.

20. A judgment on a complaint that does not state facts sufficient to constitute a cause of action cannot be sustained. *Barron v. Frink*, 30 Cal. 486.

21. Although the statute does not require the assessed value of property to be alleged in the complaint in an action to recover taxes, yet if it is alleged, and the record shows that a judgment was rendered for a greater term than the total amount of county and State taxes authorized to be levied by law, the judgment will be reversed. *People v. Hastings*, 26 Cal. 668.

22. Where a demurrer is filed to the defendant's answer, it is irregular for plaintiff to take judgment before some disposition is made of the demurrer. And where the record on appeal discloses this state of facts, and nothing more from which an abandonment of the demurrer can be inferred, the judgment will be reversed. *Huss v. Moore*, 20 Cal. 115; *Hestres, Administrator, v. Clements*, 21 Cal. 425.

23. When a judgment by default will be reversed on appeal. See *ante*, § 150, Nos. 43-49.

24. Judgment will not be reversed on account of variance between pleadings and proof. See *ante*, § 71.

25. Judgment, where one of several parties appeal.—Where only one of several defendants, against whom a judgment has been rendered, appeals to the Supreme Court, the appellate Court, if it reverse the judgment, may reverse or modify it as to any or all of the parties defendant. Where, in such case, the error assigned only affects the party appealing, the Court will not presume error as to the parties not appealing, and will reverse the judgment only as to the party appealing. *Rickelson v. Richardson*, 26, Cal. 152.

26. Where there are several parties defendant, and some appeal, and from the judgment against themselves the judgment as to appellants may, and will on motion be reversed without affecting the judgment against the other defendants, who are not parties to the appeal. *Minturn v. Baylis*, Oct. T. 1867.

27. On reversing judgment the supreme court may render a new judgment.—The Court, on reversing a judgment, can render such judgment as the Court below should have done. *Gahn v. Neville*, 2 Cal. 81; *Biddleman v. Keven*, Id. 248.

28. When the Court below has wrongfully refused to dissolve an attachment improperly issued, the Supreme Court will order it dissolved, even if the final judgment is affirmed on a review of the case. *Griswold v. Sharps*, 2 Cal. 17.

29. Instead of remanding a cause for a new trial, where the judgment below is erroneous, this Court will so modify it as finally to settle the controversy, when the rights of the parties appear from the records to be finally ascertained. *Perse v. Cole*, 1 Cal. 369.

30. After a judgment has been rendered by the Supreme Court, a material modification of such judgment should not be made upon a petition for a rehearing—the rehearing should first be granted. *Clark v. Boureau*, 14 Cal. 634.

30. Judgment directed in the court below.—The Court below cannot refuse to give effect to the judgment of this Court; and a judgment entered by the Clerk, in such case, is just as binding as if entered in the Supreme Court itself. *McMillan v. Richards*, 12 Cal. 467.

31. It is not the practice of this Court to direct the entry of a judgment in the

Court below, in actions at law, except where the facts have been found by the Judge who tried the cause, or by the special verdict of a jury, or where, from the character of an action or pleadings, one of the party is entitled to judgment without proof. *Bagley v. Eaton*, 10 Cal. 126.

32. The Court below allowed to enter judgment for plaintiff, on the return of the case, for the amount of the verdict, if plaintiff so desires; otherwise, to re-try the cause. *Reniff v. Cynthia*, 18 Cal. 669.

33. The law regards the substance more than the form, and where the proceeding, though in form a case of contempt, is in substance a private right, the appellate Court will compel the Court below to issue an attachment to punish a contempt. *Merced Co. v. Fremont*, 7 Cal. 130.

34. Where the Court below granted a nonsuit—the case being submitted on complaint on an undertaking and answer—the Supreme Court, while reversing the judgment below, refused to enter judgment for plaintiff, although the answer presented no defense, holding, that as there was no trial below, the Court could not know what course defendants would have taken, by amendments or otherwise, by way of defense to the action. *McMillan v. Dana*, 18 Cal. 339.

35. Case remanded, with directions to add to the judgment already had in the Court below for plaintiff for the land, the yearly rent as found by the jury. *Bay v. Pope*, 18 Cal. 694.

36. Case where Supreme Court, after reversing judgment by default because the complaint contained several items, some of which were illegal, remanded the cause with liberty to defendant to set up defense. *People v. Hager*, 19 Cal. 462.

37. If an attorney stipulates, under a mistake of fact, that a notice of appeal has been filed, when no notice has been filed, the Court below, upon a proper application, may relieve him from it, but the Supreme Court cannot. *Bonds v. Hickman*, 29 Cal. 460.

38. The appellate Court may add to the judgment of reversal directions that the cause be tried *de novo*, or that a particular issue be tried, leaving all the other facts found by the Court, remaining as facts in the case, or that the Court enter a judgment upon certain specified facts in the case. *Argenti v. City of San Francisco*, 30 Cal. 458.

39. If the judgment is erroneous, and the findings of fact are such as to enable the Supreme Court to determine what kind of a judgment should have been rendered, it will direct the Court below to render the proper judgment. *Loce v. Shartzer*, 31 Cal. 488.

40. Judgment reversed, with leave to plaintiff to amend his complaint, or he may be advised. *Marriner v. Smith*, 27 Cal. 654.

41. When new trial will be ordered.—When it is apparent that, in case a new trial should be granted, the verdict of the jury must be in favor of the plaintiff, the judgment of the Court below, in favor of the plaintiff, will not be disturbed. *Tohler v. Falsom*, 1 Cal. 207.

42. Where, on appeal, the complaint is so radically defective as not to authorize the judgment of the Court below, a new trial may be granted, with leave to the plaintiff to amend his complaint, on such terms as the Court below may deem just. *Sterling v. Hanson*, 1 Cal. 478.

43. When it is manifest, from the testimony stated in the record, that the verdict of the jury must have been given under a state of great excitement, preventing a fair and just trial, and the Court below has refused a new trial, this Court will reverse the judgment, and order a new trial. *The People v. Acosta*, 10 Cal. 195.

44. When the complaint, evidence as admitted, the verdict, and judgment are in harmony, but the judgment is erroneous, by reason of a wrong construction given to the description of land in a deed in evidence, the Supreme Court cannot modify the judgment, but will refuse it and grant a new trial. *Hicks v. Coleman et al.*, 25 Cal. 122.

45. Where a lessor sues to enjoin the lessee from taking the bricks from and destroying a brick building erected by the lessee on the lot leased, the tenant claiming the right to remove the building under the terms of the lease, and claims damages in the sum of \$1,000, and the answer makes no denial of

the damages, and no proof thereof is offered, and the Court, after hearing, grants the injunction but refuses a judgment for damages: *Held*, that although plaintiff makes a cross appeal from the refusal to allow his damages as claimed, yet as defendant may have been taken by surprise, this Court will remand the case for trial *de novo* upon the question of damages, with privilege of amending the pleadings so as fairly to present the issue on this point. *Jungerman v. Bovee*, 19 Cal. 355. See further, *ante*, § 193, No. 165.

46. Dismissal of appeal.—See § 346, note No. 42.

46. Errors, when may be presented for the first time in the supreme court.—If the complaint does not show a good cause of action, the judgment will be reversed, though no objection be taken below. *Russell v. Ford*, 2 Cal. 86; *Gregory v. Ford*, 14 Cal. 138; *Barron v. Frink*, 30 Cal. 486; *Himelmann v. Danos*, April T. 1868.

47. An objection to the complaint that defeats only plaintiff's present right to recover must be made in the Court of original jurisdiction during the term at which the judgment is rendered. But when the defects are of such a serious character as to show that plaintiff could not at any time obtain any judgment upon the cause of action alleged, then the objection may be made for the first time in the appellate Court. *Hentsch v. Porter*, 10 Cal. 555.

48. Where a bill in equity shows on its face that plaintiff is not entitled to relief, the defect may be taken advantage of in the appellate Court, even though no demurrer be filed. *White v. Pratt*, 13 Cal. 521.

49. Where objections to evidence, though not made in the Court below, could not be under any circumstances there obviated, such objection may be taken for the first time in the Supreme Court; as, for example, objections to the substantial cause of action, not to its technical form of statement, and to the jurisdiction of the Court below, may be presented to the Supreme Court for the first time, or may be considered by the Court, whether its attention be directed to them or not. *Mott v. Smith*, 16 Cal. 533.

50. Errors, which cannot be presented for the first time in the supreme court.—An objection to the misjoinder of the defendant. *Sands v. Pfeiffer*, 10 Cal. 258.

51. That certain parties could not intervene. *McKenty v. Gladwin, Hugg & Co.*, 10 Cal. 227.

52. That a supplemental complaint should have been filed. *Van Mares v. Johnson*, 15 Cal. 308.

53. Objection to the form of a complaint or answer. *Sutter v. Cox*, 6 Cal. 415; *Duff v. Fisher*, 15 Id. 375.

54. That one of two counts in a complaint in an equitable action should not be tried by a jury. *Baker v. Joseph*, 16 Cal. 173.

55. An objection to an order overruling a motion to set aside the judgment and quash the execution not excepted to. *Smith v. Curtis*, 7 Cal. 584.

56. An objection to the form of a verdict. *Douglass v. Kraft*, 9 Cal. 562.

57. An objection to evidence. *Potter v. Karney*, 8 Cal. 574. See *post*, note No. 78.

58. An objection that an account presented to the supervisors of a county was not "authenticated," as required by the statute (Acts 1857, 167). *Randall v. Yuba County*, 14 Cal. 219.

59. Grounds for a nonsuit which were not taken in the Court below. *Baker v. Joseph*, 16 Cal. 173.

60. An objection that the finding is qualified by the words "as to plaintiff, Parke," and that the facts showing this relation to him ought to have been found, should have been taken below. *Parke v. Hinds*, 14 Cal. 415.

61. The question of the Statute of Limitations cannot be raised on appeal, unless presented in some form on the trial below, even though it be pleaded. *McDonald & Blackburn v. Bear River & Auburn Water & Mining Co.*, 13 Cal. 220.

62. That interest was improperly allowed. *Whiting v. Clark*, 17 Cal. 497.

63. A mistake in the taxation of costs. *Gay v. Franklin*, 5 Cal. 416.

64. That a stipulation filed in the Court below was disregarded. *Clark v. Forshay*, 3 Cal. 290.

65. Error in a decree which could have been corrected in the Court below. *Phelan v. Ruiz*, 15 Cal. 90.

66. Objections to the verification of a complaint that it was not authenticated by the seal of the notary; that there was no venue to the affidavit; that there was no evidence that the officer was a notary public, etc., should be taken in the Court below, and cannot be raised for the first time in this Court. *Kuhland v. Sedgwick*, 17 Cal. 123.

67. If the plaintiff on the trial treats an allegation of the complaint as denied in the answer, and introduces evidence to prove it, he will not be permitted, after the issue is found against him, to raise the point for the first time in the Supreme Court that such allegation is not denied. *Racouillat v. Rene*, 32 Cal. 450.

68. If a complaint contains more than one count, and one of the counts does not state a cause of action, the answer need not deny the allegations of such count, and objections may be made to it for the first time in the Supreme Court. *Haskell v. Moore*, 29 Cal. 437.

69. When parol testimony to vary the terms of a written agreement is offered and received in the Court below, without objection, the objection cannot be raised in the Supreme Court that the testimony was inadmissible. *Tebbs v. Weatherman*, 23 Cal. 58; *Douglass v. Kroft*, 9 Cal. 562; *People v. Glenn*, 10 Cal. 32; *Payne v. Treadwell*, 16 Cal. 247.

70. In a civil action, a party cannot raise the objection for the first time in the Supreme Court that the jury before which the cause was tried in the Court below was not duly selected and summoned as required by law. To enable a party to avail himself of such objection, it must be made in the Court below. *Spencer v. Doane*, 23 Cal. 418.

71. A fact not directly averred in the complaint, but which, in the pleadings and in the findings of the Court, is incidentally recognized and treated as true and not in controversy, cannot be questioned for the first time in the appellate Court on objection to the complaint. *People v. Jones*, 20 Cal. 50.

72. The respondent may insist, in the appellate Court, upon a point properly presented, although it is not urged in a trial. *Kidd v. Teeple*, 22 Cal. 255.

73. An objection to an answer because it does not state the particular facts and circumstances constituting the alleged fraud, cannot be raised for the first time in the appellate Court. *King v. Davis*, Oct. T. 1867.

74. Objections to evidence will not be noticed in the Supreme Court, unless taken in the Court below in the first instance, if they be of a character which might there have been obviated by the production of other evidence or the release of the interest of witnesses, or an amendment to the pleadings, or in any other way. *Mott v. Smith*, 16 Cal. 535.

75. Where the error of a decree is apparent by reference to the bill and decree, the party aggrieved may assign the error, though no demurrer be interposed. *Gregory v. Ford*, 14 Cal. 138.

76. Errors must be raised in the Court below.—Errors cannot be relied on in an appellate Court which are not taken advantage of and raised in the Court below. *Morgan v. Hugg*, 5 Cal. 409.

77. The Supreme Court will consider only errors of law, to which exceptions have been regularly taken. *McCartney v. Fitz Henry*, 16 Cal. 184; *Collier v. Corbett*, 15 Id. 183.

78. Objections to the introduction of evidence confined in the appellate Court to the grounds taken below. *Natoma Water & Mining Co. v. Clarkin*, 14 Cal. 544; *Baker v. Joseph*, 16 Id. 173.

79. Review of evidence on appeal from judgment.—On appeal from a judgment, the Supreme Court will look at the evidence so far only as to see the relevancy of the exceptions taken during the trial. *Carpentier v. Williamson et al.*, 25 Cal. 159. See ante, § 193, notes No. 112-122.

80. On an appeal from a judgment, errors in the rulings of the Court below, in the progress of the trial, are subject to review when the exceptions are preserved by bill of exceptions, or brought up in a statement on appeal. *Id.*

81. Findings of fact cannot be reviewed by the appellate Court on an appeal from a judgment. *Racouillat v. Rene*, 32 Cal. 450; *People v. Parrott*, Jan. T. 1868.

82. The Supreme Court cannot examine the evidence for the purpose of finding a fact. To do so would be the exercise of original rather than appellate jurisdiction. *Elks v. Jeans*, 26 Cal. 275; *Carpentier v. Gardiner*, 29 Id. 160.

83. On an appeal from a final judgment, the Supreme Court will not review the evidence to ascertain whether the facts found by the referee are supported by the evidence. The evidence will not be reviewed except on an appeal from an order denying a new trial. *Id. Hihn v. Peck*, 30 Cal. 280.

84. On an appeal from a judgment, the appellate Court cannot consider the question whether the findings of fact are justified by the evidence. *People v. Barnard*, 27 Cal. 474; *Burnett v. Pacheco*, 27 Id. 409.

85. On an appeal from a judgment, when there is no statement, the Supreme Court will only consider matter appearing in the judgment roll. *Harper v. Miner*, 27 Cal. 109.

86. If there is no statement on appeal, no specification of errors is required. *Burnett v. Pacheco*, 27 Cal. 409.

87. On an appeal from a judgment, if no errors are assigned in the record, the appellate Court will only review the judgment roll. *Millard v. Hatheway et al.*, 27 Cal. 137.

88. Presumptions.—The notices and affidavits filed on an application to retax costs, were not embodied in a bill of exceptions or statement. *Held*, that the judgment must be affirmed, upon the presumption that the Court below decided properly upon all the evidence before it. *Gales v. Buckingham*, 4 Cal. 286.

89. Error will not be presumed, but must be affirmatively shown, and all intendments are in favor of the regularity of the Court below. *Ford v. Holton*, 5 Cal. 319.

90. The fact of the appellants having objected, in the Court below, to the introduction of evidence of location of a school land warrant, on the ground that it was not recorded in the proper office, is not sufficient to justify the appellate Court in presuming that such was the case, when the statement on appeal contains no evidence of the fact. *Nims v. Johnson*, 7 Cal. 110.

91. Where the evidence is not set out in a statement on appeal, this Court will presume that the Court below had good reason for granting a new trial. *Dickinson v. Van Horn*, 9 Cal. 207.

92. Where the instruction may be correct under any state of facts, then the Supreme Court presumes in favor of the judgment below, and will not reverse it when there is no statement of facts or bill of exceptions—because the appellant must show affirmative error. *People v. Levison*, 16 Cal. 98.

93. Every intendment must be in favor of a decision of the Court below; and a cause will not be reversed upon an error of law, unless it appears from the statement or pleadings in the case that the party complaining is injured by such error. *Johnson v. Sepulveda*, 5 Cal. 149; *Grewell v. Henderson*, 7 Cal. 290; *Ringgold v. Haven*, 1 Cal. 108; *Crane v. Brannan*, 3 Cal. 195.

94. Where there are two presumptions equally reasonable arising upon the face of the record, this Court is bound to adopt that which will maintain the judgment of the Court below. *Whipley v. Flower*, 6 Cal. 630.

95. Where the record does not contain the instructions of the Court below, the presumption will be that the laws applicable to the facts were correctly given to the jury. *Aldrich v. Palmer et al.*, 24 Cal. 515.

96. The Supreme Court will not presume error, or that facts exist which would show error. If the Court below commits error in its finding or judgment, that error, or the facts necessary to establish it, must be shown affirmatively by the appellant. *Herriter v. Porter*, 23 Cal. 385.

97. The general rule is, that if error intervenes, the judgment must be reversed, but if, during the subsequent proceedings of the trial, the foundation of the error is overthrown, and facts are shown which support the ruling of the Court, the error is cured. *People v. Anderson*, 26 Cal. 130.

98. Error will not be presumed, and if the record does not show that the Court erred in striking out an answer, the judgment will not be reversed on this ground. *Dimitck v. Campbell*, 31 Cal. 238.

99. The appellate Court will not assume that the Court below committed

error unless the record shows wherein, and one who alleges error must rely on the record to disclose it. *Waldie v. Doll*, 29 Cal. 555.

100. The presumption is, that all the facts in a record, bearing on the points decided, have received due consideration by the Supreme Court, whether all or a part, or none of those facts are mentioned in the opinion. *Mulford v. Estudillo*, 32 Cal. 131.

101. When there are both issues of law and fact joined in the same cause, and the cause is tried on the issues of fact and a judgment rendered, the presumption will be indulged, on appeal, that the issue of the law had been first disposed of. *Brooks v. Douglass*, 32 Cal. 208.

102. The Court will presume, after a verdict, that facts imperfectly alleged in a complaint have been proved, but it will not presume that a material fact not at all stated has been proved. *Barron v. Frink*, 30 Cal. 486.

103. The presumptions of law are all in favor of the correctness of the judgment of the Court below. Error will not be presumed, but must be shown affirmatively. *Landers v. Bolton*, 26 Cal. 403.

105. If the findings are defective, the presumption is that the facts not found were proved, unless the Court below is requested to supply the defect, and fails or refuses to do so. *Lyons v. Leimback*, 29 Cal. 139.

106. Where the appellant shows error, the presumption is that he has been prejudiced by it, and if the respondent claims that he has not been so prejudiced, it is incumbent on him to see that the record discloses the fact that such claim is well founded. *Norwood v. Kenfield*, 30 Cal. 394.

107. What will not be considered by the supreme court.—On appeal by a plaintiff from an order overruling a motion for a new trial made by him on the ground of insufficiency of the evidence to justify the verdict, an exception taken by defendant on the trial to the competence of a witness who testified for plaintiff will not be considered. *Pierce v. Jackson*, 21 Cal. 636.

108. The Court refused to consider an assignment of error made by respondent by stipulation. See opinion. *Paul v. Magee*, 18 Cal. 698.

109. Questions not directly involved upon appeal, and those which are unnecessary to a judgment of affirmance or reversal, will not be considered. *West v. Smith*, 5 Cal. 96.

110. Points not made in the Court below, nor embraced in the grounds upon which the appeal was taken, will not be considered by this Court. *Stoddard v. Treadwell*, 29 Cal. 281.

111. The Supreme Court will not investigate and decide questions not regularly arising in the due course of litigation, in order to gratify the curiosity of counsel or parties who procure them, to be raised against themselves by others who feel no interest in the contest. *People v. Pratt*, 30 Cal. 223.

112. When questions are not presented in good faith, in the regular course of honest litigation, the Supreme Court will not pass upon them. *Id.*

113. Supreme court may amend the record, or modify a judgment, when.—A mere clerical error in a judgment, not affecting the appellant, can be corrected, and is not ground for reversal. *Anderson v. Parker*, 6 Cal. 197.

114. A motion to amend the judgment of the Supreme Court must be made within the ten days allowed for filing a petition for re-hearing. *Gray v. Gray*, 11 Cal. 341.

115. If no motion be made in the Court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the Supreme Court at appellant's cost. *Tryon v. Sutton*, 13 Cal. 490; 15 Cal. 9.

116. Errors in dates, in copies of documents, in the description of premises taken for conveyances, and the like, can be corrected by a re-settlement; and upon proper showing, made before argument, the Supreme Court may send the record back to the Court below for that purpose. So where the errors are admitted. *People v. Romero*, 18 Cal. 89.

117. Where, on appeal from an order granting a new trial, the Supreme Court affirmed the "judgment" below, and the remittitur was issued; and then, at a subsequent term, the respondent moved the Court to amend its judgment by making it read, "The order of the District Court granting a new trial is affirmed," instead of "The judgment is affirmed." *Held*, that the

motion will be granted, on the principle that courts have the power to amend clerical errors, and enter a judgment *nunc pro tunc* when the record itself discloses that error, even though the term has elapsed. *Swain v. Naglee*, 19 Cal. 127.

118. The appellate Court may order a document to be inserted in or stricken from the transcript, in order to perfect it, but it cannot vary or amend the document itself. *Bonds v. Hickman*, 29 Cal. 460.

119. The Supreme Court has no authority to correct the records in the lower courts. Applications to correct errors in the records of District Courts, if any exist, must be made in lower courts. *Boston v. Haynes*, 31 Cal. 107; *Brooks v. Lubback*, April T. 1865.

120. Where there is a discrepancy between the finding of facts and the judgment, this Court may, on appeal, order the proper modification of the judgment; but where the judgment is in harmony with the pleadings and the finding of facts, and is erroneous by reason of a variance between the finding and the proof, this Court will not modify the judgment to suit the proof. *Clark v. Huber*, 20 Cal. 196.

121. When a demurrer to a complaint is sustained in the Court below, and plaintiff declines to amend and appeals from the judgment and the order sustaining the demurrer, the Supreme Court, if it affirm the judgment, cannot grant plaintiff to amend his complaint. *People v. Jackson et al.*, 24 Cal. 630.

122. The Supreme Court cannot amend a complaint so as to make it correspond with the verdict. *Hooper v. Wells, Fargo & Co.*, 27 Cal. 311.

123. Where the appeal is only from an order denying a new trial, the appellate Court may, if the case requires it, go back to the complaint and strike out one or more of the causes of action, and if there is a good count remaining, and the findings authorize it, modify the judgment. *Argenti v. City of San Francisco*, 30 Cal. 458. [See same case, 32 Id. 414.]

124. E. recovered judgment against J. and L. and L. for possession of five hundred acres of land, and five thousand dollars damages. The Supreme Court reversed the judgment, because the damages were excessive, and because E. was in possession of one hundred and eighty acres of the land when suit was brought. E. offered to release the damages and the one hundred and eighty acres from the operation of the judgment. Held, that as neither the pleadings nor findings of fact fixed the location of the one hundred and eighty acres, the Supreme Court could not modify its judgment. *Ellis v. Jeans*, 26 Cal. 275.

125. Damages and costs.—Ten per cent. damages was awarded by the Supreme Court where the appeal was for delay. *Russell v. Williams*, 2 Cal. 158.

126. Where the respondents obtained a judgment on the twenty-third of December, 1851, and the appeal bond was filed on the twenty-fourth of December, and a certificate of the clerk of the same Court, dated February 2d, 1852, that no transcript, record, or other papers in the cause had been filed, and the affidavit of respondents produced that the appeal was taken for delay, the Court ordered the appeal to be dismissed, with ten per cent. damages and costs. *Buckley v. Stebbins*, 2 Cal. 149.

127. When the objection to the judgment was entirely unsupported, the judgment was affirmed, with ten per cent. damages. *Bates v. Visher*, 2 Cal. 355.

128. When the questions raised by the record, on appeal in this Court, have been repeatedly settled by this Court, or are decided by reference to plain elementary principles of law, the judgment of the Court below will be affirmed, with damages. *Pinkham v. Wemple*, 12 Cal. 449.

129. Where a judgment was affirmed in part, and reversed in part, the respondent was allowed his costs in Court below, but was required to pay the costs of the appeal. *Cole v. Swanston*, 1 Cal. 51.

130. Where an appellant has failed to file a transcript of the record showing that the appeal had been perfected, the Court ordered it dismissed, with ten per cent. costs. *Pacheco v. Bernal*, 2 Cal. 150.

131. Fifteen per cent. damages awarded in *De Witt v. Porter*, 13 Cal. 171; twenty per cent. in *Nickerson v. California Stage Company*, 10 Cal. 520.

132. It is no proper ground for a motion to dismiss an appeal that it is sham or frivolous, though it may be a good reason for a speedy submission and decision of the appeal. An appeal is a matter of right, and that right cannot be defeated because the appeal may be groundless. The remedy of the respondent in such cases is by an award of damages by this Court under section three hundred and forty-five of the Practice Act. *Rickelson v. Compton*, 23 Cal. 649.

133. When irrelevant matter to any considerable extent is introduced into the record on appeal, the Supreme Court will visit the party who insisted upon its introduction with costs of that portion of the record, whether he succeeds upon the merits of the case or not. *Harper v. Minor*, 27 Cal. 109.

134. Defendants below and appellants here, on the main question, to wit: the injunction, required to pay costs in this Court on both appeals. *Jungerman v. Bovee*, 19 Cal. 355.

135. **Restitution of property and rights.**—The eighth section of the act concerning Courts of justice, which provides that when a "judgment or order is reversed or modified, this Court may make complete restitution of all property and rights lost by the erroneous judgment or order," does not cover the case of a judgment for the recovery of money. It applies only to those cases where the judgment operates upon specific property in such a manner that its title is not changed; as, by directing the possession of real estate, or the delivery of documents, or of particular personal property in the hands of the defendant, and the like. *Farmer v. Rogers*, 10 Cal. 335.

136. The three hundred and forty-fifth section of the Practice Act, authorizing the Supreme Court, on the reversal or modification of the judgment or order below, to make restitution of the property and rights lost by the erroneous judgment or order, does not exclude the lower Court from exercising the same power. *Reynolds v. Harris*, 14 Cal. 667.

137. **Effects of reversal.**—After reversal of an erroneous judgment, the parties in the Court below have the same rights which they originally had. *Phelan v. Supervisors of San Francisco*, 9 Cal. 15.

138. Therefore, when a final judgment or demurrer to the complaint sustaining the demurrer was reversed, the plaintiff had the right to amend, on application to the Court below. *Id.*

139. A judgment "of reversal" in the Supreme Court is not necessarily a bar to further proceedings in the action. The opinion rendered with the judgment is advisory to the Court below, and after the reversal of an erroneous judgment, the parties have the same rights which they had originally. *Stearns v. Aguirre*, 7 Cal. 443.

140. Where a judgment is rendered in this Court reversing the judgment of the Court below, and remanding the case for further proceedings, it becomes the law of the case, though erroneous. *Gunter v. Laffan*, 7 Cal. 558; *Clary v. Hoagland*, 6 Cal. 685.

141. Where a judgment is rendered, and an appeal taken to this Court, the Court below loses control over the judgment, and an order amending the judgment is erroneous. *Bryan v. Berry*, 8 Cal. 130. See further, *ante*, § 144; Nos. 104-108.

142. **Supreme court loses jurisdiction, when.**—This Court loses all control and jurisdiction over a case after the remittitur has been filed in the Court below. *Blane v. Bowman*, 22 Cal. 23.

143. A motion, therefore, to vacate a judgment on the ground that it was not rendered by the proper members of the Court, cannot be entertained after the remittitur has been filed below. *Id.*

144. **District court cannot modify the judgment of the supreme court.** Plaintiffs recovered judgment against the defendants for a certain sum of money. Plaintiffs claimed that it should have been for gold coin; an appeal was taken on that point and the Supreme Court held that a certain portion of the amount found due was payable in any kind of lawful money, and that the balance was payable in gold coin. Upon filing the remittitur the plaintiffs moved for a judgment for interest accrued on the demand for which the action

was brought, during the interval between the commencement of the action and the rendering of the judgment in the District Court; motion denied and plaintiff appealed. *Held*, that the District Court had no power at the time the motion was made to further modify the judgment by opening it and adding the interest thereto. *Meyer v. Kohn*, Oct. T. 1867.

145. If the Supreme Court directs the District Court to enter a judgment in a case in particular form, the District Court has no authority to enter a different judgment from that directed, even if the judgment directed fails to give the party what was justly or legally his due. *Argenti v. Sawyer*, 32 Cal. 414.

146. A decision of the Supreme Court in a case becomes the law of that case in all its stages. *Id.*

147. The opinion of the supreme court in the law of the case.

148. A ruling by the appellate Court upon a point distinctly made upon a previous appeal, is in all subsequent proceedings in the same case a final adjudication, from the consequences of which the Court cannot depart nor the parties relieve themselves. *Phelan v. San Francisco*, 20 Cal. 39.

149. When an appeal is taken from an order granting a preliminary injunction, and the order is reversed, the opinion of the Court will not apply to any new state of facts which may appear in record or an appeal from the final judgment. *Trinity County v. McCammon et al.*, 25 Cal. 119.

150. See further, § 193, sub-head, "Law of the Case." No. 232.

151. Writ of error to the Supreme Court of the United States, and proceedings connected therewith.

152. When writ of errors lies.—The true test as to whether a writ of errors lies to the Supreme Court of the United States from the final judgment of a State Court is to be arrived at, not from mere averment in the pleadings, but from the matter decided, as developed in the whole record. *Greely v. Townsend et al.*, 25 Cal. 614.

153. A writ of error does not lie to the Supreme Court of the United States from the judgment of the Supreme Court of this State, by which judgment is decided that where a State school land warrant is located upon lands previously occupied and settled upon by another, and pre-empted by him, under the laws of the United States, the patent issued by the State, under the location, is void, and the patentee cannot maintain an action against the pre-emptor to recover possession of the same. *Athearn v. Poppe*, and *Bours v. Walsh*, 25 Cal. 632.

154. The construction of an act of Congress was not necessary in rendering such judgment, but the State law under which the warrant was located afforded a rule for the complete determination of the rights of the party who made the location. *Id.*

155. When a final judgment in a suit has been rendered in the highest Court of law or equity of a State in which a decision in the suit could be had, and a writ of error has been issued by the Clerk of the Circuit Court of the United States, directed to the Judges of the Court in which the judgment was rendered, commanding that the record be sent before the Supreme Court of the United States to be there reviewed. The presiding Judge of the Court in which the judgment was rendered, is not compelled, as a matter of right, to award a citation to the respondent to appear before the Supreme Court of the United States to maintain the validity of his judgment, but he may look into the record for the purpose of determining whether in his opinion the judgment is one from which a writ of error lies, and if he determines that it is not, he may refuse the citation. *Greely v. Townsend et al.*, 25 Cal. 608.

156. The granting of a citation is not a mere ministerial act, but one of judicial discretion. *Id.*

157. Writ of error from judgment concerning pueblo lands.—A writ of error does lie to the Supreme Court of the United States from a judgment rendered by the Supreme Court of this State, by which it is decided that the City of San Francisco was, at the date of the conquest and cession of California, and long prior thereto, a pueblo, and that as such pueblo she had

a title to the lands within her general limits, and that such lands were held by the city in trust for public uses, and were not, either under the old government or the new, the subject of seizure and sale under execution issued on a judgment against the city. *Id.*

158. *Citation upon writ of error and undertaking thereon*.—The Judge of the United States District Court for the District of Oregon has no authority, while holding the Circuit Court of the United States for the District of California, to sign a citation upon a writ of error from the Supreme Court of the United States to the Supreme Court of this State; nor has he authority to take and approve of the security required in order to make the writ of error a *supersedeas* and operate as a stay of execution upon the judgment to be reviewed. *Tompkins v. Mahoney*, 32 Cal. 231.

159. *Findings*.—What questions will be considered in the Supreme Court. See *ante*, § 180, note No. 46.

160. *Referee's report*.—When it will be renewed. See *ante*, § 187, note No. 49.

§ 846. *'Appellant shall furnish requisite papers.*

On an appeal from a final judgment, the appellant shall furnish the Court with a transcript of the notice of appeal, the pleadings, or amended pleadings, as the case may be, which form the issues tried in the case, the judgment, and such other parts of the judgment roll, and no more, as are necessary to present or explain the points relied on, and the statement, if there be one, certified by the attorneys of the parties to the appeal, or by the Clerk, to be correct. On appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the Court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used on the hearing in the Court below, such copies to be certified in like manner to be correct. If any written opinion be placed on file in rendering the judgment or making the order in the Court below, a copy shall be furnished. If the appellant fail to furnish the requisite papers, the appeal may be dismissed.

¹Amended Stat. 1854, §1; 1864, 247.

1. *Notice of appeal*.—It is not necessary that there should be a direct statement in a transcript of the fact of service of a notice of appeal. It is sufficient within the rule laid down in 8 Cal. 340, and 10 Cal. 491, if there is a notice of appeal in the record with acknowledgment of service rendered thereon. *West. Pacific R. R. Co. v. Reed*, Jan. T. 1867.

2. If the attorney of the parties stipulate in the transcript that notice of appeal was filed in the Court below, and served, the Supreme Court cannot receive evidence contradicting the stipulation, and will not dismiss the appeal on the ground that no notice was in fact filed. *Bonds v. Hickman*, 29 Cal. 460.

3. *Undertaking*.—A statement in the transcript that an undertaking in due form was filed within the time presented, is sufficient, or a copy may be given. *Wakeman v. Coleman*, 28 Cal. 58; *Franklin v. Goodman*, Oct. T. 1866.

4. Transcripts used on appeal to this Court must show that an undertaking has been filed in due time, and that a notice of the appeal has been duly served upon the other side. *Franklin v. Reiner*, 8 Cal. 340.

5. Parties intending to take advantage of the failure to file the requisite undertaking, must do so before the case is submitted. *Cook v. Kink*, 8 Cal. 352.

6. Transcript on appeal from an order granting or refusing a new trial.—On appeal from an order granting or refusing a new trial, there is no necessity for preparing a statement on appeal—the statement on motion for new trial being sufficient. *Loucks v. Edmondson*, 18 Cal. 203.

7. When an appeal is taken from an order granting or refusing a new trial, no statement on appeal need be made or filed after the entry of the order, but the statement prepared and used on the hearing of the motion in the Court below will be sufficient in the Supreme Court. *Walden v. Murdock*, 23 Cal. 540.

8. Upon an appeal to the Supreme Court from an order denying a new trial, the appellant must furnish the Supreme Court with a copy of the papers used on the hearing of the motion for new trial in the Court below, and if he fail to do so, the appeal will, on motion, be dismissed. *Bodley v. Ferguson et als.*, 25 Cal. 584.

9. If the Court below denies a new trial, on the ground that the evidence is insufficient to sustain the cause of action alleged, and an appeal is taken from the order, the transcript must contain an authenticated copy of the pleadings, or an agreed statement of their contents. *McQuade v. Whaley*, 29 Cal. 612.

10. An order denying or granting a new trial is not one of the orders referred to in section three hundred and thirty-eight of the Practice Act, to which a statement may be annexed on appeal. *Quivey v. Gambert*, 32 Cal. 304.

11. On appeal from an order denying a new trial, the appellant is only required to furnish the appellate Court with copies of the notice of appeal, order appealed from, and of the papers used on the hearing of the motion for new trial in the Court below. *Wakeman v. Coleman*, 28 Cal. 58.

12. The record on appeal from the order granting or denying a new trial consists of the affidavits and statement upon which the motion was made, in connection with such pleading, depositions and minutes, as were read and referred to, identified by the certificate of the Judge. *Wetherbee v. Davis*, Oct. T. 1867.

13. On an appeal from an order dismissing a motion for a new trial.—When the only point is as to whether the statement was filed in time, it is not necessary to insert the statement itself in the record. *Harper v. Minor*, 27 Cal. 109.

14. On an appeal from an order made after final judgment.—The transcript should contain a copy of the order appealed from, and copies of all the papers used on the hearing when the order was made by the Court below. *Glidden v. Packard*, 28 Cal. 649.

15. On an appeal from an order made on affidavits filed, no statement is necessary. The affidavits must be annexed to the order, in place of a statement, and the certificate of the Clerk should specify the affidavits used; and to enable him to do so, he should, at the time, mark them as filed on the motion. *Paine v. Linhill*, 10 Cal. 370.

16. Where a notice of motion to dismiss a complaint on specified grounds is given, to obtain a review of the order made on the motion, the record must disclose the papers read or the evidence offered in their support. *Fretorn v. Glaser*, 10 Cal. 337.

17. On appeal from a judgment.—If no errors are assigned in the record, the appellate Court will only review the judgment roll. *Millard v. Hathaway et al.*, 27 Cal. 119.

18. A statement, which does not purport to be a statement on appeal, cannot be considered on an appeal from the judgment. *Levy v. Getteson*, 27 Cal. 686.

19. **Two appeals in the same case, transcripts.**—If the plaintiff and defendant each appeal from different portions of the same judgment, and the parties do not stipulate that either transcript may be added to the other, each appeal must be heard on its own transcript. *Fair v. Stevenot*, 29 Cal. 486.

20. **Affidavits filed by a defendant in opposition to an application for an injunction made upon the complaint alone** are part of the record, and upon appeal from the order may be considered, although not embraced in the statement. *Gagliardo v. Grippen et al.*, 22 Cal. 362.

21. Nor do affidavits used on motion to open the judgment form any part of the record, where there is no certificate of the Judge's clerk or admission of counsel that they were used for that purpose. *Ritter v. Mason*, 11 Cal. 214.

22. The Supreme Court will not notice affidavits where there is nothing in the transcript to show that they were read or referred to at the trial in the Court below. *Fowler et al. v. Harbens*, Jan. T. 1865.

23. **Lost record, how supplied.**—Where an appeal has been taken to the Supreme Court, and the transcript cannot be made out, by reason of the loss of a portion of the records of the case from the files of the Court, it is the duty of the appellant to move the Court below, at the earliest time possible, to supply the lost papers by copies or by some other means under its control. *Buckman v. Whitney et al.*, 24 Cal. 267.

24. If material portions of the statement, or motion for new trial, or of the papers referred to in the statement, have been lost, and are not supplied and substituted by the District Court, an appeal from the order denying a new trial will be dismissed. *Buckman v. Whitney*, 28 Cal. 555.

25. If either party is dissatisfied with an order of the District Court in supplying a lost record, it may be reviewed by an appeal from the order. *Id.*

26. If the record or a portion of it in the District Court has been lost, and either party desires to appeal, an order of the District Court reciting the copies of the lost papers have been furnished, and directing that such copies may be used on appeal to the Supreme Court, is not an order substituting and supplying the lost record, and there is no record in the District Court from which a transcript on appeal can be taken. *Id.*

27. **An appellant cannot leave out of the transcript any portion of the statement as settled**, unless on stipulation of the other party. *Kimball v. Semple*, 31 Cal. 657.

28. **What should be omitted.**—The clerk's minutes at a trial. *People v. Empire G. & S. Co.*, Oct. T. 1867.

29. A copy of the minutes of the Court, as kept by the clerk during the progress of the trial. *Mendocino County v. Morris*, 32 Cal. 145.

30. Matter that does not tend in some degree to illustrate the points made on appeal. *Estate of Boyd*, 25 Cal. 512.

31. If an amended complaint and answer are filed, and no question arises on the original pleading, it is not necessary to include them in the transcript on appeal. *Marriner v. Smith*, 27 Cal. 649.

32. A bill of exceptions is a part of the judgment roll. *Wetherbee v. Davis*, Oct. T. 1867.

33. **Judgment roll.**—See *ante*, § 203.

34. **Stipulations, waivers, etc.**—A stipulation inserted in the transcript and not embodied in a statement or bill of exceptions, forms no part of the record which this Court can notice. *Ritter v. Mason*, 11 Cal. 214.

35. Where there is in the transcript a stipulation by the parties that "the plaintiff duly excepted" to the "charges and each part thereof," it will be construed as a stipulation that the exceptions were sufficiently specified to render them available. *Bowman v. Cudworth*, 31 Cal. 148.

36. If the attorneys for appellant and respondent stipulate in writing that the statement contained in the record is a correct statement on motion for a new trial, and that the judgment roll, orders and instructions given and refused by the Court, the statement and stipulation constitute a true and correct statement on appeal to the Supreme Court, and may be used as such

without further certificate or identification; all technical objections to the transcript are waived, and it will be presumed that a notice of motion for a new trial was regularly given, although none appear in the record. *Godchaux v. Mulford*, 26 Cal. 319.

37. If a case is submitted on its merits by consent of counsel, this submission, even if made before the day the case is set for argument, is a waiver of technical objections to the transcript. *St. John v. Kidd*, 26 Cal. 265.

38. Where a complaint appears in a transcript on appeal without any indorsement as filed, the party who brings it up as a part of the record, without moving to strike it out or to correct the record, is estopped to deny that it was duly filed. *Mahlstadt v. Blanc*, Jan. T. 1868.

39. It is the duty of the appellant to attend to clerical and typographical errors, and see that each transcript is a copy of the original in all respects other than maps and surveys. *Franklin v. Goodman*, 31 Cal. 458; *Kimball v. Semple*, 31 Id. 657.

40. Amendments to transcript.—If a case is on the calendar and submitted for decision on briefs to be filed in vacation, it will require a strong showing to justify this Court, on motion made at the next term, in permitting additions to the transcript to be made of matters before deliberately omitted by the moving party. *Ketchum v. Crippen*, 31 Cal. 365. See post, Appendix, Supreme Court Rules, No. XII.

41. Enforcement of judgments of supreme court.—The Supreme Court cannot revise its own judgments, but when proceedings founded on them are brought up for review, it will make such orders as are necessary to cause the judgment to be enforced. *Id. Argenti v. City of San Francisco*, 30 Cal. 458.

42. Dismissal of appeal.—An appeal will not be dismissed on the ground of insufficiency in the justification of the sureties on the undertaking, when the undertaking was both to render the appeal effectual and to stay execution, and the justification was sufficient for the former purpose. *Dobbins v. Dollarhide*, 15 Cal. 374.

43. Where there are no assignments of error by the appellant, the judgment of the Court below will be affirmed. *People v. Goldbury*, 10 Cal. 312.

44. Where there is no assignment of errors, or statement of the points and authorities on which the appellant relies, the appeal will be dismissed. *People v. Comedo*, 11 Cal. 70; *Id.* 129.

45. An order vacating a dismissal of appeal, obtained upon a stipulation signed by counsel for respondent in ignorance of the dismissal, will be set aside on his motion. *Noriega v. Knight*, 20 Cal. 172.

46. It is no proper ground for a motion to dismiss an appeal, that it is sham and frivolous. An appeal is a matter of right, and cannot be defeated because the appeal may be groundless. *Ricketson v. Compton*, 23 Cal. 636.

47. In *Lynch, Administrator, v. Dunn* (Jan. T. 1868) the appeal was dismissed. See statement of facts; dismissal of appeal; see ante, § 337, note C.

48. Appeal dismissed without prejudice to a new appeal.—Appeal dismissed without prejudice to a second appeal, and permission given to use the transcript on file if a second appeal be taken. *Gordon v. Wansley et al.* 19 Cal. 82.

49. The dismissal in this case was without prejudice to a second appeal; permission was given to use the transcript on file in case of a second appeal. *Davling v. Moore*, 19 Cal. 81.

50. Dismissal of appeal, effect of.—A dismissal of an appeal by the Supreme Court is, in legal effect, an affirmance of the judgment of the Court below, as conclusive and binding upon the parties, and the Court as a direct judgment of affirmance, unless the appellant obtains an order setting aside the dismissal and reinstating his appeal before the adjournment of the term. *Roe-land v. Kroyenhagen*, 24 Cal. 57.

51. Where an appeal, regularly taken, is dismissed for want of prosecution, the dismissal operates as an affirmance of the judgment below, and a second appeal cannot be allowed. *Id.; Chamberlain v. Reed*, 16 Cal. 207.

52. The only mode of avoiding the consequence of such dismissal is to move, during the term, or before the *remittitur* has gone out, to vacate the order of dismissal and reinstate the cause. *Id.*

53. The case in which dismissal of an appeal will not operate as a bar to a second appeal, and hence, not as an affirmation of the judgment below, are those where the dismissal has been made upon some technical defect in the notice of appeal, or the undertaking, or the like. The bar operates where the dismissal is for want of prosecution, and the order is not vacated during the term, or the dismissal is on the merits. *Karth v. Light*, 15 Cal. 324.

54. Fraud in procuring dismissal of appeal.—If any fraud or imposition has been practiced upon the Court, or the opposite party, by the party procuring the dismissal, or the order of dismissal has been improvidently granted upon a false suggestion, or under a mistake as to the facts of the case, the appellate Court will recall the *remittitur* and stay proceedings in the Court below, and assert its jurisdiction, even after the adjournment of the term, upon the ground that jurisdiction cannot be divested by an irregular or an improvident order, and that the order is a nullity. *Rowland v. Kreyenhagen*, 24 Cal. 52.

55. District courts have no jurisdiction to determine what papers may be used on appeal to the Supreme Court. *Buckman v. Whitney*, 28 Cal. 555.

56. Generally.—An affidavit of one of the attorneys in a cause showing the objections made to the selection of the jury, although copied into the transcript, is no part of the record, and therefore cannot be noticed. *Magee v. The Mokelumne Hill Company*, 5 Cal. 258.

57. A statement of the contents of the pleadings made by appellant's counsel, and placed in the transcript, but not agreed to by the opposite attorney, or included in the settled statement, constitutes no part of the record. *McQuade v. Whaley*, 29 Cal. 612.

58. An appeal suspends the operation of a judgment, and while pending, the party in whose favor it is rendered has no vested right in the judgment, but his right is limited to his cause of action. *People v. Frisbie*, 26 Cal. 137.

59. The Justices of the Supreme Court do not take from the clerk's office or examine the original transcript, unless it contains the only copy of a map or survey. *Franklin v. Goodman*, 31 Cal. 458.

60. An erroneous judgment cannot be corrected by bringing suit in the nature of a bill of review. The proper method is by appeal. *Savings and Loan Society v. Thompson*, Oct. T. 1867.

61. When counsel in the argument of a case assume a certain principle advanced by them as correct law, and the Court decides the case upon the assumption thus made by counsel without discussing the correctness of this assumption, the opinion is not authority that such assumption is correct law. *Donner v. Palmer*, 31 Cal. 500.

62. The respondent on an appeal to the Supreme Court is at liberty to suggest any ground that he may choose, to show that the ruling of the Court below was right, whether the grounds suggested were advanced in the discussion before the Court below or not, while the appellant is confined to the objections urged in the Court below. *Clarke v. Huber*, 25 Cal. 598.

63. A judgment in another case printed in the transcript on appeal from an order refusing to dissolve an injunction which is not made a part of the complaint or answer by averment, and was not one of the papers upon which the injunction was granted, or upon which the motion to dissolve was heard, is not a part of the record. *Sanchez v. Carriaga*, 31 Cal. 170.

64. If on the rendition of a final judgment the Court also grants a perpetual injunction, and an appeal is taken from the whole judgment, the injunction is included in the appeal. *McGarrahan v. Maxwell*, 28 Cal. 75.

TITLE XXX.

CHAPTER II.—*Appeals to the Supreme Court from the District Courts.*

SECTION 347. When an appeal may be taken.

348. Appellant shall file undertaking within five days.

349. Undertaking on appeal from a money judgment.

350. Appeal from a judgment for delivery of documents or personal property.

351. Appeal from a judgment directing the execution of a conveyance, etc.

352. Undertaking on appeal from a judgment concerning real property.

353. Stay of proceedings. The security on appeal may be limited in case of executor, etc.

354. Undertaking may be in one instrument or several.

355. Justification of sureties on undertaking on appeal.

356. Undertaking in cases not specified above.

357. Appeals may be brought to a hearing on notice.

358. On judgment on appeal, a remittitur shall be certified to the Clerk of the Court below.

§ 347. ¹ *When an appeal may be taken.*

An appeal may be taken to the Supreme Court from the District Courts in the following cases:

First—From a final judgment entered in an action or special proceeding commenced in those Courts, or brought into those Courts from other Courts.

Second—From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from any special order made after final judgment, and from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties, and directs partition to be made.

¹ Amended Stat. 1854, 92; 1863, 757; 1866, 707. As to definition of "order," see *post*, § 515, of "final judgment," *ante*, § 144, 1-14.

1. An appeal will lie.—From a judgment or order putting a party in contempt. *Ex parte Rowe*, 7 Cal. 175; *Ware v. Robinson*, 9 Cal. 107.

2. From an order setting aside a final decree in equity and granting a rehearing. *Riddle v. Baker*, 13 Cal. 295.

3. From an order changing the judgment. *Bryan v. Berry*, 8 Cal. 130.

4. From an order refusing to quash an execution. *Gilman v. Contra Costa County*, 8 Cal. 52.

5. From error of law excepted to, an appeal lies without motion for new trial. *Rice v. Gashirie*, 13 Cal. 53.

6. An appeal lies from an order setting aside a final decree in equity and granting a rehearing, as it is in effect granting a new trial. *Riddle v. Baker*, 13 Cal. 302.

7. In suit by a stockholder against a corporation and its officers, praying for their removal, and for an account and settlement of the affairs of the corporation, the decree, after a full hearing on the merits, was in accordance with the prayer; and also appointed a receiver to take charge of the property of the corporation until the further order of the Court; collect money due or to become due it; sell certain stock, and pay the proceeds in accordance with the decree, etc. Held, that this provision in the decree does not destroy its effect as a final decree, and that an appeal lies therefrom. *Neall v. Hill*, 16 Cal. 145.

8. Pease, who had instituted a suit in the Supreme Court of New York against defendants, moved the Fourth District Court of this State, where the suit of *Adams v. Woods et al.* was pending, for an order on Naglee—receiver in this last suit, and as such having in his possession the books of the firm—to attach certain of those books to his deposition to be taken under commission from New York in the suit there. The Court below ordered the books to be delivered to Wells, Fargo & Co., to be by them taken to New York, and after being used on the trial in Pease's suit, to be returned to Naglee. Held, that this intervention by Pease is in effect a special proceeding, involving new and distinct rights, and that the order is not interlocutory, and may be appealed from. *Adams v. Woods*, 18 Cal. 30.

9. An appeal to a demurrer for want of proper parties is good, where it is determined by the Court that a substantial right is affected by the omission to join such party. *Burgoyne v. Holmes*, 3 Cal. 50.

10. Under the act regulating appeals, passed the twenty-sixth of April, 1851, an appeal lies from every order and decision of an inferior Court which affects a substantial right. *Id.*

11. An appeal lies from a judgment in a proceeding to condemn lands to the use of a corporation, and from an order granting or refusing a new trial after judgment in such proceeding. *San Francisco and San Jose Railroad Co. v. Mahoney*, 29 Cal. 112. From a judgment in an insolvent case to the Supreme Court. *People v. Rosborough*, 29 Cal. 415.

12. From an order made by a Judge at Chambers, setting aside an execution and perpetually staying the enforcement of the same. *Bond v. Pacheco*, 30 Cal. 530.

13. From a judgment in an action for partition entered upon the confirmation of the report of the commissioners appointed to make the partition. *Peck v. Vandenberg*, 30 Cal. 11.

14. An order striking out or refusing to strike out statement on motion for new trial, is interlocutory to the order granting or refusing to grant a new trial, which is the final and appealable one. *Ketchum v. Crippen*, 31 Cal. 365.

15. An order made by the Judge at Chambers, granting an injunction, is appealable. *Sullivan v. The Triunfo Mining Co.*, Oct. T. 1866.

16. The fact that judgment has been rendered in the District Court for a sum less than \$300 does not oust the appellate jurisdiction of the Supreme Court, provided the sum sued for in the complaint amounts to \$300. *Solomon v. Reese*, Oct. T. 1867.

17. In proceeding to condemn land for railroad purposes, the decision of the Court by which the merits of the matter are finally determined is a final judgment, rendered in a special proceeding, for which an appeal may be taken, and cannot, therefore, be reviewed by a writ of error. *Sacramento, P. & N. R. R. Co. v. Harlan*, 24 Cal. 334.

18. No appeal will lie.

20. From an order refusing or granting a change of venue. *Id.*; *Juan v. Ingoldsby*, 6 Id. 439.

21. From a judgment of nonsuit entered on motion of plaintiff. 6 Cal. 666.

22. From an order made before final judgment refusing to transfer a cause from a District Court of this State to a Court of the United States, because of the alienage of defendant. *Hopper v. Kalkeman*, 17 Cal. 517; *Brooks v. Calderwood*, 19 Id. 124.

23. As no appeal lies from such order, the Supreme Court has no jurisdiction on such appeal to pass upon the merits of the motion to transfer the cause, even with the consent of the parties. *Id.*

24. From an order refusing to set aside a former order. *Henly v. Hastings*, 3 Cal. 341; *Horn v. Volcano W. Co.*, 18 Cal. 141.

25. From a mere decision on demurrer before final judgment. *Moraga v. Emeric*, 4 Cal. 306.

26. From an order making a new party defendant. *Beck v. City of San Francisco*, 4 Cal. 375.

27. From an order refusing to grant a commission to take testimony. *People v. Stillman*, 7 Cal. 117.

28. From an interlocutory order, except in the cases provided by statute. Such order can only be reviewed on appeal from the final judgment. *De Berry v. Lambert*, 10 Cal. 503.

29. An appeal will not lie from an order of Court refusing to set aside an interlocutory judgment. It should be taken upon the order itself. *Stearns v. Marvin*, 3 Cal. 376.

30. By the amended Practice Act, an appeal does not lie from an interlocutory order. *The People v. Thurston*, 5 Cal. 517.

31. Appeals from interlocutory orders are the creations of statute, and cannot be extended by implication. *Juan v. Ingoldstby*, 6 Cal. 489.

32. An order setting aside the report of a referee appointed to take an account, is merely interlocutory, and is not the subject of appeal before final judgment or decree. *Johanson v. Dopkins*, 6 Cal. 83.

33. An order refusing to issue a commission to take testimony, and an order refusing to change the venue, are not appealable orders, though they may be reviewed on appeal from final judgment. *People v. Stillman*, 7 Cal. 117.

34. This Court will not hear any objections to an order entered in the Court below by consent of parties. *Meerholz v. Sessions*, 9 Cal. 277.

35. An order setting aside the findings of a referee in a divorce case, and sending the case back to the referee for further testimony, is interlocutory in its character and not the subject of appeal. *Baker v. Baker*, 10 Cal. 527.

36. No appeal lies to the Supreme Court from an order of the Court below overruling a demurrer to an indictment. *People v. Ah Fong*, 12 Cal. 424.

37. A party cannot appeal from an order overruling a motion for a new trial, when he fails to prosecute his motion before the District Court. The failure to prosecute, in such a case, is an abandonment of the motion. *Mohoney v. Wilson*, 15 Cal. 43; *Frank v. Doane*, 15 Id. 903; *Green v. Doane*, Id. 304.

39. Where a party resorts to a summary remedy by motion to set aside an order, and has tried the motion on the merits, he cannot fall back and seek to reverse the order by a direct appeal. *Horn v. Volcano Water Co.*, 18 Cal. 141.

40. No appeal lies from an order entering a default; and where a default for not answering is entered several years before final judgment, the defendant may still appeal from the final judgment at any time within one year from its rendition, and have the question, whether the default was properly entered or not, adjudicated upon the appeal from the judgment. *Ricketson v. Compton*, 23 Cal. 636.

41. From an order denying a motion for leave to intervene. *Wembora v. Boston*, 23 Cal. 321.

42. An order made in an action pending in the District Court staying all proceedings therein until the further direction of the Court, is not an appealable order. The remedy of a party prejudiced thereby is by application for a mandamus to compel the Court to proceed. *Rhodes v. Graig*, 21 Cal. 419.

43. The Supreme Court has no jurisdiction to review the action of the District Court on appeal from an order recalling an execution for costs, or refusing to issue one when the amount of costs exceeds two hundred dollars. *Meeker v. Harris*, 23 Cal. 285.

45. On an appeal from an order made after final judgment directing a receiver to pay over to the prevailing party moneys in his hands, the Supreme

Court cannot reverse the order appointing the receiver. *Whitney v. Buckman*, 26 Cal. 451.

46. An appeal does not lie from an order directing a statement on motion for a new trial to be settled. *Leffingwell v. Grifing*, 29 Cal. 192.

47. An appeal does not lie from an order striking out a statement on motion for a new trial. *Quivey v. Gambert*, 32 Cal. 304.

48. No appeal lies from an order striking out a statement, or from an order denying a motion to certify a statement. *Genella v. Relyea*, 32 Cal. 159.

49. A plaintiff cannot appeal from a judgment of nonsuit rendered on his own motion. *Sleeper v. Kelly et al.*, 22 Cal. 456.

50. An order refusing to strike out a statement made on motion for a new trial, is not an appealable order. It is not "a special order made after final judgment" within the meaning of sections 336 and 347 of the Practice Act. *Ketchum v. Crippen*, 31 Cal. 365.

51. No appeal lies directly from an order overruling exceptions to a referee's report. *Peck v. Courtis*, 31 Cal. 207.

52. No appeal lies from an order refusing to amend an order allowing time to move for a new trial. *Pendegast v. Knoch*, 32 Cal. 73.

53. No appeal lies from an order striking out a statement prepared and filed on motion for a new trial. *Id.*

54. If the plaintiff dismisses the action before trial, and the Court, on defendant's motion, makes an order restoring the cause to the calendar for trial, no appeal lies from this order. *Dimick v. Deringer*, 32 Cal. 488.

55. Generally.—A party cannot be permitted to prosecute two separate and distinct remedies in the Supreme Court for a review of the same question at the same time. *Kirk v. Reynolds*, 12 Cal. 99.

56. An appeal from a judgment, and from an order denying a new trial, may each be prosecuted separately in the same action, or the two appeals may be prosecuted together. *Carpentier v. Williamson et al.*, 25 Cal. 159.

57. Query: Can an appeal be taken from an order of a Court Commissioner dissolving an injunction, without first applying to the District Court to correct the error. *Stone v. Bunker Hill Co.*, 28 Cal. 497.

58. If testimony, not competent in law, to prove a fact, is admitted without objection, and the testimony is treated by the parties as competent in the Court below, the question as to its competency cannot be raised in the appellate Court. *Curia v. Packard*, 29 Cal. 194.

59. As to the right of appeal there is no distinction between judgments by default and judgments after issue joined and a trial, nor between cases once denominated cases at law and cases in equity. *Hallock v. Jandin & Co.*, Oct. T. 1867.

60. Where a party appeals from a judgment after it has been vacated and set aside by an order granting a new trial, the appeal will be dismissed. *Kower v. Ghuck*, Oct. T. 1867.

61. Orders in partition.—An appeal does not lie from an interlocutory judgment, rendered in an action for partition, determining the interests of the several parties, and appointing a referee to make a partition and report the same to the Court. *Gates v. Solomon*, 28 Cal. 320.

62. If the interlocutory judgment in partition adjudges that one of the parties has no interest in the property, it is not a final judgment as to him, from which he can appeal. *Peck v. Vandenberg*, 30 Cal. 11.

63. On the 22d of April, 1863, no appeal could be taken from an interlocutory judgment, in an action for partition to be made. Nor was an appeal from such a judgment, rendered before the passage of the act, given by the act of March 23d, 1864. *Id.* No appeal lies from an order sustaining or overruling a demurrer, until a final judgment is rendered in the cause. *Moulton v. Ellmaker*, 30 Cal. 527.

64. The act of 1864, allowing appeals to be taken from an interlocutory order in partition, determining the rights of several parties and directing a partition, does not apply to such judgments rendered before its passage. *Peck v. Courtis*, 31 Cal. 207.

65. **Review of order denying costs.**—An error of the Court, in refusing to allow a party costs, cannot be reviewed on an appeal from an order denying a new trial. *Stevenson v. Smith*, 28 Cal. 102.

66. An appeal cannot be taken from an order denying a motion to retax costs made before final judgment. *Levy v. Getteson*, 27 Cal. 686.

67. **Appeal from order refusing to retax costs.**—An order denying a motion to retax costs should be reviewed by an appeal from the judgment, and annexing a statement to the judgment roll. *Id.*

68. An order made on a motion to retax costs is not appealable. The error can be revised only on an appeal from the judgment. *Lasky v. Davis*, Oct. T. 1867.

§ 348. *Appellant shall file undertaking within five days.*

To render an appeal effectual for any purpose, in any case, a written undertaking shall be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars; or that sum shall be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking shall be filed, or such deposit made, with the Clerk within five days after the notice of appeal is filed. *

See post, § 355; N. Y. Code, § 334; Bancroft's Forms, 485. *Certain parties not required to give an undertaking.* See notes to § 76 and 337, ante.

1. Construing sections three hundred and forty-eight and three hundred and thirty-seven of the Practice Act together, they provide that an appeal is not effectual for any purpose unless an undertaking be filed or a deposit made with the clerk within five days after filing the notice; and failure to so file the undertaking or make the deposit will be fatal to the appeal, and it must be dismissed. *Elliott v. Chapman*, 15 Cal. 383; *Gordon v. Wansey*, 19 Cal. 82, affirming the last case.

2. **Execution and formal parts of undertaking.**—Under our statutes, undertakings are on the same footing with bonds. *Cornfield v. Bates*, 13 Cal. 606.

3. The execution of the paper, the delivery of it to the clerk, filing it among the papers, with the affidavit, and the actual suspension of proceedings, is *prima facie* a sufficient proof of delivery, if delivery is essential, as if the instrument were sealed. *Dore v. Covey*, 13 Cal. 502.

4. The stay of proceedings accorded by the statute to the execution of the undertaking, is a sufficient consideration. *Id.*

5. Where an instrument purporting to be a bond on appeal contains words of obligation, and has a scroll opposite the name of one of the two signers, who contemporaneously verify the instrument as their bond, it is the bond of both. *Cornfield v. Bates*, 13 Cal. 606.

6. Where the appeal is *bona fide*, and not taken for delay, appellate Courts will always permit a new undertaking to be filed where the original is defective. *Coulter v. Sturk*, 7 Cal. 244.

7. Where an appeal has been dismissed for want of a proper bond, and no final judgment has been rendered, an appeal can be taken at any time within the period allowed by law. *Martinez v. Gallardo*, 5 Cal. 155.

8. Residence of the sureties, and their occupation, and that the penalty must be double the amount of the judgment, are directory provisions, and are intended for the benefit of the other party, and he may waive them. In this

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*Need undertaking may be filed
Statute, Cal. 1861 Sec. 3 p. 589*

case the respondent treated the appeal as regularly made, made no motion to dismiss, issued no execution, and suffered the undertaking to have the full effect of a regularly executed instrument. *Dore v. Covey*, 13 Cal. 502; *Dobbins v. Dollarhide*, 15 Cal. 376.

9. The names of the sureties need not appear in the body of the papers. *Id.*

10. The statute requires the places of residence and occupation of the sureties to be stated in an undertaking on appeal only when a stay of execution upon a judgment directing the payment of money is sought. *Dobbins v. Dollarhide*, 15 Cal. 374.

11. The omission of the words "to pay to" will not invalidate the obligation of an appeal bond. Even were this not the case, where such an omission occurs, leave should be granted to file a good bond. *Billings v. Roadhouse*, 5 Cal. 71.

12. An undertaking on an appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant should unite. *Curtis v. Richards*, 9 Cal. 33; *Tissot v. Darling*, 9 Cal. 278.

13. But, conceding that there is a necessary discrepancy between the condition and the penal portion of the bond, it cannot be set up by the obligors, as the bond would be single, and in a suit thereon the plaintiff would be entitled to the full amount. *Suain v. Graves*, 8 Cal. 549.

14. Where a motion to reconsider an appeal was opposed on the ground that the undertaking on appeal was invalid, and after argument and submission, was denied on this ground: *Held*, that it was then too late for appellant to appear to file a new undertaking. The offer should have been made before the motion was submitted. *Tevis v. O'Connell*, 21 Cal. 512.

15. An undertaking on appeal filed under the three hundred and forty-eighth section of the Practice Act is not invalidated because the sum mentioned exceeds three hundred dollars. *Zoller v. McDonald*, 23 Cal. 136.

16. **Time of Filing.**—The undertaking on appeal to the Supreme Court must in all cases be filed within five days after filing notice of appeal, and the Court has no power to extend the time. *Elliott v. Chapman*, 15 Cal. 383.

17. Construing sections three hundred and forty-eight and three hundred and thirty-seven of the Practice Act together, they provide that an appeal is not effectual for any purpose unless an undertaking be filed or a deposit made with the clerk within five days after filing the notice; and failure to so file the undertaking or make the deposit will be fatal to the appeal, and it must be dismissed. *Id.*

18. The period of five days fixed by law for filing the undertaking, cannot be abridged by the error or negligence of the appellant; nor can that appellant, by serving a copy of the notice of appeal before the original is filed, keep the respondent watching the clerk's office to see when it is done. *Hastings v. Halleck et al.*, 10 Cal. 31.

19. If the appellants have been guilty of no laches in perfecting their appeal, the Court may enlarge the time for them to file their bond to entitle them to a stay of proceedings under the statute, and in the meantime order a stay of all proceedings in the inferior Court until the extended period shall have expired; in such case the Court may impose such terms as shall appear proper. *Bradley v. Hall*, 1 Cal. 199.

20. Where an undertaking on appeal is filed within the statutory time, and the sureties are excepted to, and appellant gives notice that they will justify, and both parties appear before the officer at the time fixed for justification, and a new undertaking is then filed in place of the old one, the appeal will not be dismissed because the undertaking was not filed within five days after filing notice of appeal. *Cummins v. Scott*, 23 Cal. 526.

21. *Elliott v. Chapman*, affirmed; *Rabe v. Hamilton*, commented on. New York cases commented on and shown not to be in point as to the necessity of filing the undertaking on appeal within five days after notice filed, because the New York Code fixes no time within which the undertaking must be filed. *Shaw v. Randall*, 15 Cal. 384.

22. Provisions in a statute in regard to the time within which an act is

required to be done, are generally to be construed as directory; but such a construction is improper where a consequence is attached to a failure to comply with the statute. *Id.*

23. If an undertaking on appeal is filed before the notice of appeal is filed and served, the appeal will be dismissed on motion. *Carpenter v. Williamson*, 24 Cal. 609.

24. Effect of filing undertaking.—The perfecting an appeal does not release the lien acquired by docketing the judgment. *Low v. Adams*, 6 Cal. 277.

25. Where the notice of appeal recites that the appellant appeals both from an order granting a writ of assistance and from an order refusing to set it aside, and the undertaking on appeal stipulates to answer the consequences of the appeal from the former order only: *Held*, that this order alone will be considered by the Supreme Court. *Horn v. Volcano Water Co.*, 18 Cal. 141.

26. An undertaking in the sum of three hundred dollars, as required by the three hundred and forty-eighth section of the Practice Act, is sufficient to perfect such appeal and stay proceedings. *Pierson v. McCahill*, 23 Cal. 249.

27. To render an appeal effectual for any purpose in any case, the undertaking or deposit must be given or made, as provided in section three hundred and forty-eighth. In sections three hundred and forty-nine to three hundred and fifty-two, inclusive, a stay is granted by executing another and different undertaking. In the three hundred and fifty-sixth section it is provided that in cases not provided for in the sections above, the giving, the undertaking, or making the deposit named in section three hundred and forty-eight, shall stay proceedings in the Court below upon the judgment or order appealed from. *Merced Mining Co. v. Fremont*, 7 Cal. 132.

28. Where, in an action for personal property, with damages for its detention, the verdict was for defendant, and subsequently the Court below made an order granting a new trial, from which order defendant appealed to the Supreme Court, giving an undertaking for damages and costs under the three hundred and forty-eighth section of the Practice Act, and the Court below, against the objection of defendant, proceeded to try the cause a second time when plaintiff had verdict and judgment: *Held*, that the judgment must be removed, because the Court below could not proceed with a second trial until the appeal from the order was determined. *Ford v. Thompson*, 19 Cal. 118.

29. On an appeal from an order granting a new trial in such case, the verdict being in favor of the defendant and appellant, an undertaking for damages and costs, according to section three hundred and forty-eighth of the Practice Act, is sufficient to stay proceedings pending the appeal. *Id.*

30. The state or a county need not file an undertaking.—Where the people of the State are appellants, it is not necessary to file the usual undertaking on appeal. *The People v. Clingan*, 5 Cal. 389. See *ante*, § 76, notes (a) (b).

31. No undertaking on appeal is necessary when the appeal is taken by a county. *Warden v. Mendocino County*, 32 Cal. 655.

32. A bond to stay proceedings is not necessary in order to perfect an appeal from a decree of the District Court of the United States approving of a survey or a Mexican or Spanish grant. *Thornton v. Mahoney et al.*, 24 Cal. 568.

33. Actions on an undertaking on appeal.—Where an appeal is withdrawn or dismissed by consent of both parties, without being called to a final hearing, no action can be maintained on the appeal bond. *Osborn v. Hendrickson*, 6 Cal. 175.

34. Where, in an action on an appeal bond conditioned to pay the judgment appealed from, if the same should be affirmed by the appellate Court, it appeared that the judgment appealed from was reversed, with directions to enter a different judgment: *Held*, that the conditions of such bond were not broken, and that no action would lie thereon. *Chase v. Ries*, 10 Cal. 517.

35. To enable the assignee of a judgment to sue on the appeal bond filed in the cause, he must have an assignment of the bond. *Moses v. Thorne*, 6 Cal. 87.

36. Where a surety undertakes that his principal shall pay any judgment to be rendered, etc., the judgment against the principal is conclusive against the surety. *Pico v. Webster*, 14 Cal. 204.

37. Where an appeal is taken by a party, and, as a condition to give it effect, a bond or undertaking with or by sureties is annexed—the undertaking being executed for the benefit of the appellant—the law presumes that it was executed at his request; and probably no proof of that fact is requisite in a suit by the surety against the appellant for money paid on account of the suretyship. At all events, very slight proof of such request would be required. *Bostic v. Love*, 16 Cal. 72.

38. The sureties on an undertaking are entitled to stand on the precise terms of the contract, and there is no way of extending their liability beyond the stipulation to which they have chosen to bind themselves. *Turpey v. Schillenberger*, 10 Cal. 390.

39. An undertaking on appeal conditioned for the payment of what the judgment creditor has no legal right to receive, is not, as to such condition, binding upon the sureties. *Whitney v. Allen*, 21 Cal. 233.

40. Where an appeal is dismissed on motion of respondent, based on written consent of the appellant, the dismissal operates as an affirmation of the judgment, and charges the sureties on the undertaking on appeal. *Chase v. Beraud*, 29 Cal. 138.

41. Where an appeal is taken to the Supreme Court from a judgment, by filing notice of appeal and undertaking, and the appeal is afterwards dismissed by the Supreme Court for failure of the appellant to send up a transcript, the sureties are liable on the undertaking on appeal. *Ellis v. Hull*, 23 Cal. 160; see *post*, § 352.

§ 349. ¹ *Undertaking on appeal from a money judgment.*

If the appeal be from a judgment or order directing the payment of money, it shall not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, stating their places of residence and occupation, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from, or any part thereof, be affirmed, the appellant shall pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal. When the judgment or order appealed from is made payable in a specified kind of money or currency, the undertaking required by this section shall be drawn and made payable in the same kind of money or currency specified in such judgment.

¹Amended 1863, 690; Bancroft's Forms, 485. N. Y. Code, § 335. Certain parties not required to give an undertaking. See *ante*, § 76, notes (a) (b).

1. By the Code, the undertaking on appeal providing for the liabilities of the sureties upon condition of the affirmation of the judgment operates as a stay; and if, by a mere neglect to prosecute the appeal, and for that reason suffering it to be dismissed after the respondent has been deprived of his rights under the judgment by the undertaking, the sureties could be released upon the pretense that the judgment was not affirmed, it is evident that great injustice would in many instances be perpetrated, and a fraud practiced upon

the respondents. *Karth v. Light*, 15 Cal. 327; *Chamberlin v. Reed*, 16 Cal. 207; *Chase v. Beraud*, 29 Id. 138.

2. If, in foreclosure cases, a judgment *in personam* is rendered against the defendants, and also one enforcing the lien, and an appeal is taken from the whole judgment in order to stay proceedings upon the whole judgment, the appellant must file an undertaking for costs, one in double the amount of the personal judgment, and one for the payment of waste and such deficiency as may remain due after the sale of the property, and all these undertakings may be in one instrument, or several, at the option of the appellant. *Englund v. Lewis et al.*, 25 Cal. 356.

3. In such cases, if the undertaking is given only for costs and waste and deficiency, an execution on the personal judgment is not stayed pending the appeal; and if the undertaking is given only for costs and double the amount of the personal judgment, an execution for the sale of the property upon which the lien is foreclosed is not stayed pending the appeal. *Id.*

4. An appeal will not be dismissed on the ground of insufficiency in the justification of the sureties on the undertaking, where the undertaking was both to render the appeal effectual and to stay execution, and the justification was sufficient for the former purpose. *Dobbins v. Dollarhide*, 15 Cal. 374.

5. Where the examination of the sureties does not disclose sufficient property to make the undertaking operate as a stay, but does disclose sufficient to render appeal effectual, respondent's remedy is by motion in the Court below for leave to proceed on the judgment, notwithstanding the undertaking, and not by motion in the Supreme Court to dismiss the appeal. *Dobbins v. Dollarhide*, 15 Cal. 374.

6. The statute requires the place of residence and occupation of the sureties to be stated in an undertaking on appeal only when a stay of execution upon a judgment directing the payment of money is sought. *Id.*

7. An undertaking without such statement will render the appeal effectual; and as to the operation of such an undertaking as a stay, this case requires no decision. *Id.*

§ 350. *Appeal from a judgment for delivery of documents.*

If the judgment or order appealed from, direct the assignment or delivery of documents, or personal property, the execution of the judgment or order shall not be stayed by appeal, unless the things required to be assigned or delivered, be placed in the custody of such officer or receiver as the Court may appoint; or unless an undertaking be entered, into, on the part of the appellant, with at least two sureties, and in such amount as the Court, or the Judge thereof, or County Judge, may direct, to the effect that the appellant will obey the order of the Appellate Court upon the appeal.

N. Y. Code, § 336. See notes (a) (b), *ante* § 76.

§ 351. *Appeal from a judgment directing the execution of a conveyance, etc.*

If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order shall not be stayed by the appeal until the instrument is executed and deposited with the Clerk

with whom the judgment or order is entered, to abide the judgment of the Appellate Court.

See notes (a) (b), § 76, *ante*.

§ 352. *Undertaking on appeal concerning real property.*

If the judgment or order appealed from direct the sale, or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the Judge of the Court by which the judgment was rendered or order made, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

N. Y. Code, § 338; Bancroft's Forms, 487. See notes (a) (b), *ante*, § 76.

1. **Generally.**—Where an appeal is taken from a decree foreclosing a mortgage by the mortgagor, who is in possession of the premises, the statute does not require an undertaking on appeal, binding the appellant to account to the plaintiff for the rents, or for the value of the use and occupation of the premises pending the appeal. *Whitney v. Allen*, 21 Cal. 233.

2. The provision in section 352 of the Practice Act in regard to use and occupation refers to cases in which the creditor is entitled to the use, and more particularly to judgments and orders directing a delivery of possession. It was not intended by this section either to increase the liability of the debtor, or to subject the sureties to a liability greater than that of the principal. *Id.*

3. An undertaking on appeal to the Supreme Court, conditioned "that appellant will pay all costs and damages which may be awarded against him on the appeal, and also all the rents and profits of the premises in controversy during the pendency of the appeal not exceeding six hundred dollars," is sufficient to sustain an appeal. *Zoller v. McDonald*, 23 Cal. 136.

4. One who appeals from a decree in his favor in order to obtain a decree for larger sum, cannot, pending the appeal, carry into execution the decree. *Hornton v. Mahoney et al.*, 24 Cal. 584.

5. An appeal duly taken to the Court of last resort, suspends all proceedings in the Court below. *Id.*

6. **Form of undertaking on appeal.**—When the judgment is for the enforcement of a lien and a sale of the property, the undertaking to stay a sale of the property pending the appeal need not provide for the payment of the value of the use and occupation of the premises. *Englund v. Lewis et al.*, 25 Cal. 356.

7. In a case where the judgment directs a sale of real property, the undertaking on appeal, in order to stay a sale, need only provide security against

waste, unless there is a provision in the judgment for the payment of a deficiency, in which case it must provide for the payment of such deficiency. *Id.*

8. When the judgment directs a sale for the purpose of satisfying any lien other than a mortgage lien, the undertaking on appeal, to stay a sale, need not provide for the payment of any deficiency which the judgment may direct to be paid. *Id.*

9. Stay of proceedings on appeal.—If, in foreclosure cases, a judgment is *personam* is rendered against the defendants, and also one enforcing the lien, and an appeal is taken from the whole judgment, in order to stay proceedings upon the whole judgment, the appellant must furnish an undertaking for costs—one in double the amount of the personal judgment, and one for the payment of waste and such deficiency as may remain due after the sale of the property; and all these undertakings may be in one instrument, or several, at the option of the appellant. *Id.*

10. In such cases, if the undertaking is given only for costs, and waste, and deficiency, an execution on the personal judgment is not stayed pending the appeal, and if the undertaking is given only for costs and double the amount of the personal judgment, an execution for the sale of his property upon which the lien is foreclosed is not stayed pending the appeal. *Id.*

11. An appeal from an order refusing to change the venue of an action, operates as a stay of all further proceedings in the case in the Court below until such appeal is determined. *Pierson v. McCall*, 23 Cal. 249.

12. Actions on undertaking on appeal.—A right of action on an undertaking, executed to stay a writ of restitution pending on appeal from a judgment in ejectment, accrues upon the affirmance of the judgment, though the liability of the obligors may continue until the applicants deliver possession of the premises recovered. *De Castro v. Clarke*, 29 Cal. 11.

13. The plaintiff in a judgment in ejectment in an action on an undertaking to stay a writ of restitution pending an appeal, can recover the value of the use of whatever part of the premises the defendants occupied, if the judgment is affirmed. *Id.* See *ante*, § 348.

§ 353. *Stay of proceedings. The security on appeal may be limited in the case of an execution, etc.*

Whenever an appeal is perfected, as provided in the preceding sections in this chapter, it shall stay all further proceedings in the Court below upon the judgment or order appealed from, or upon the matters embraced therein; and on appeal, and filing an appeal bond on appeal from an order discharging an attachment, said attachment shall not be dissolved, but shall remain in full force until the cause be disposed of on appeal; but the Court below may proceed upon any other matter embraced in the action, and not affected by the order appealed from. And the Court below may, in its discretion, dispense with or limit the security required by said sections, when the appellant is an executor, administrator, trustee, or other person acting in another's right; *provided*, that an appeal shall not continue in force an attachment, unless an undertaking be executed and filed, on the part of the appellant, by at least two sureties, in double the amount

of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the Court below be sustained; and unless, also, notice of the appeal be given within five days after service of the notice of the entry of the order appealed from, and such appeal be perfected, and the undertaking in this section mentioned be filed within five days thereafter.

¹Amended 1865-6, 707. N. Y. Code, § 339. Bancroft's Forms, 486.

1. Where a suit is pending in the Supreme Court on appeal, the judgment below is suspended for all purposes, and it is not evidence upon the questions at issue, even between the parties. *Woodbury v. Bowman*, 13 Cal. 634.

2. Proceedings stayed upon a judgment, pending an appeal, though no undertaking was given. *Ross v. Austill*, 2 Cal. 183.

3. An appeal from an order of reference stays the proceedings. *Smith v. Pollock*, 2 Cal. 92.

4. Where the sureties to an undertaking, on appeal to the Supreme Court, justify in a sum less than double the amount specified in the undertaking, but more than double the amount of three hundred dollars, such undertaking is sufficient under section three hundred and forty-eight of the Code, though insufficient to stay the issuance of the execution. *Mokelumne Hill Co. v. Woodbury*, 10 Cal. 185.

5. Where the examination of the sureties does not disclose sufficient property to make the undertaking operate as a stay, but does disclose sufficient to render the appeal effectual, respondent's remedy is by motion in the Court below for leave to proceed on the judgment, notwithstanding the undertaking, and not by motion in the Supreme Court to dismiss the appeal. *Dobbins v. Dollarhide*, 15 Cal. 374.

6. A stay of proceedings, from its nature under an appeal, only operates upon orders or judgments commanding some act to be done, and does not reach a case of injunction. *Merced Mining Co. v. Fremont*, 7 Cal. 132; *Hicks v. Michael*, 15 Cal. 109.

§ 354. *Undertaking may be in one instrument or several.*

The undertaking prescribed by sections three hundred and forty-eight, three hundred and forty-nine, three hundred and fifty, and three hundred and fifty-two, may be in one instrument, or several, at the option of the appellant.

N. Y. Code, § 340.

§ 355. *Justification of sureties on undertaking on appeal.*

An undertaking on appeal shall be of no effect, unless it be accompanied by the affidavit of the sureties that they are each worth the amount specified therein, over and above all their just debts and liabilities, exclusive of property exempt from execution, except where the judgment exceeds three thousand dollars, and the undertaking is executed by more than two sureties; they may state in their affidavits that they are severally worth amounts less than that expressed in the

undertaking, if the whole amount be equivalent to that of two sufficient sureties. The adverse party, however, may except to the sufficiency of the sureties to the undertaking of undertakings mentioned in sections three hundred and forty-nine, three hundred and fifty, three hundred and fifty-one, and three hundred and fifty-two, at any time within thirty days after the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant or appellants shall have been served with notice of such exception, justify before a Judge of the Court below, a County Judge, or County Clerk, upon five days' notice to the appellant, execution of the judgment or decree appealed from shall be no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this Act a deposit in the Court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking, and in all cases the undertaking or deposit may be waived by the written consent of the respondent.

¹Amended 1854, 92; 1865-6, 708. See *ante*, § 348; N. Y. Code, § 341; *Abb. Forms*, 1898-1899.

1. **Time of examination of sureties.**—Where a party gave notice of justification of the sureties on an undertaking before the clerk of the Court below, on the seventh of November, between the hours of ten A. M. and five P. M. of that day, and the sureties appeared upon such notice soon after the close of that day: *Held*, that the clerk acted properly in refusing to take their justification, the opposite party being absent, until the last hour stated in the notice. *Lower v. Knox*, 10 Cal. 480.

2. **Time within which to justify cannot be extended.**—Where the respondent gave notice, April 20th, excepting to the sufficiency of the sureties on an undertaking on appeal, and appellant then gave notice that the sureties would justify on the twenty-fifth of the same month, and orders were afterwards made extending the time of justification to May 1st: *Held*, that the failure of the sureties to justify within five days after notice of exception to their sufficiency rendered the appeal a nullity: that the statute upon this subject is peremptory; and that the Court had no power to extend the time. *Roush v. Van Hagen*, 17 Cal. 121.

3. **Officers before whom to justify.**—Under the three hundred and fifty-fifth section of the Practice Act, where respondent excepts to the sureties on the undertaking on appeal, the sureties must justify before a County Judge of the county where the suit is pending, where that officer is selected, and where such justification was before the County Judge of another county, where the sureties resided, the appeal will be dismissed. *Roush v. Van Hagen*, 18 Cal. 668.

4. A justification by the sureties upon an undertaking on appeal to the Supreme Court, made before a County Judge of a county other than that where the judgment was rendered, is not effectual for any purpose. *Tevis v. O'Connell*, 21 Cal. 512.

5. Under the three hundred and fifty-fifth section of the Practice Act,

where respondent excepts to the sureties on the undertaking on appeal, the sureties must justify before a County Judge of the county where the suit is pending, where that officer is selected, and where such justification was before the County Judge of another county where the sureties resided, the appeal will be dismissed. *Roush v. Van Hagen*, 18 Cal. 668.

6. Failure of sureties on exception.—A failure of sureties upon an undertaking on appeal to justify, when they are excepted to, leaves the appeal as though no undertaking had been filed, and ineffectual for any purpose. *Lower v. Knox*, 10 Cal. 480.

7. Where the appellant, on an appeal pending from the District Court to the Supreme Court, filed in the clerk's office of the District Court his notice of appeal and undertaking, and the respondent, within the time allowed by law, excepted to the sufficiency of the sureties to the undertaking, and they failed to justify to the satisfaction of the clerk of said Court, who issued execution on said judgment: Held, that it was error in the Judge of said Court to make an order of *supersedeas*, staying said execution. *Mokelumne Hill Co. v. Woodbury*, 10 Cal. 188.

8. A new undertaking may be filed, etc.—After notice of exception to the sufficiency of the sureties on an undertaking on appeal to the Supreme Court, they cannot justify without notice to the adverse party; and in this case, the justification being made without notice, the appeal was ordered to be dismissed, unless appellants within ten days file a new undertaking, and the sureties thereon justify, upon notice, to the respondent. *Stark v. Barrett*, 15 Cal. 361.

9. When, on account of the insufficiency of the undertaking on appeal, the appellant files a new undertaking in the Supreme Court, approved by one of the Justices, the respondent cannot require the sureties in the substituted undertaking to justify. *Stevenson v. Steinberg*, 32 Cal. 373.

10. The Justice approving such new undertaking, when called upon to approve the same, will ascertain by examination of the sureties that they possess the necessary qualifications. *Id.*

11. Waiver of justification of sureties.—If the sureties on an appeal bond are excepted to, and appear before the Justice to testify, and the party excepting then states before the Justice that he knows the sureties to be good, and only excepted because his attorney told him to do so, this is a waiver of justification. *Blair v. Hamilton*, 32 Cal. 49.

12. A party who excepts to the sufficiency of sureties on an appeal bond, may waive their justification. *Id.*

§ 356. Undertaking in cases not specified above.

In cases not provided for in sections three hundred and forty-nine, three hundred and fifty, three hundred and fifty-one, and three hundred and fifty-two, the perfecting of an appeal, by giving the undertaking, and the justification of the sureties thereon, if required, or making the deposit mentioned in section three hundred and forty-eight, shall stay proceedings in the Court below upon the judgment or order appealed from; except that where it directs the sale of perishable property, the Court below may order the property to be sold, and the proceeds thereof to be deposited, to abide the judgment of the Appellate Court.

N. Y. Code, § 342.

1. In an action for personal property, with damages for its detention, the

verdict was for defendant, and subsequently the Court below made an order granting a new trial, from which order defendant appealed to the Supreme Court, giving an undertaking for damages and costs, under the three hundred and forty-eighth section of the Practice Act, and then the Court below, against the objection of defendant, proceeded to try the cause a second time, when plaintiff had verdict and judgment: *Held*, that the judgment must be reversed, because the Court below could not proceed with a second trial until the appeal from the order was determined. *Ford v. Thompson*, 19 Cal. 118.

2. On appeal from an order granting a new trial, in such a case, the verdict being in favor of the defendant and appellant, undertaking for damages and costs according to the three hundred and forty-eighth section of the Practice Act is sufficient to stay proceedings pending the appeal. *Id.*

§ 357. *1 Appeals may be brought to a hearing on notice.*

Appeals in the Supreme Court may be brought to a hearing by either party, upon a notice of three days to the opposite party. Before the argument, each party shall furnish to the other, and each of the Justices, a copy of his points and authorities; or either party may file one copy thereof with the Clerk, who shall cause the requisite copies to be made.

¹Amended 1854, 92.

1. Where notice of argument has been given by the appellant, the respondent may move for an affirmance of the judgment *ex parte*, although he has given no notice of argument. *BENNETT, J. dissenting. Constant v. Ward*, 1 Cal. 333.

2. Though a decision of the Supreme Court will not be set aside for want of a formal statutory notice of argument, if the adverse party had actual notice, yet a judgment of affirmance for failure of the appellant to appear will be set aside, if he had not actual notice, etc. *Lightstone v. Laurencel*, 2 Cal. 106.

3. Where counsel, in a cause pending in the Supreme Court, stipulate to submit the case to the Court on two grounds only, it is a clear waiver of all other assignments of error, and they will not be allowed to go behind such stipulation, and insist upon points other than those mentioned in the stipulation. *Cahoon et al. v. Levy*, 10 Cal. 216.

§ 358. *On judgment on appeal, remittitur shall be certified to the Clerk of the Court below.*

When judgment is rendered upon the appeal, it shall be certified by the Clerk of the Supreme Court to the Clerk with whom the judgment roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the Clerk with whom the roll is filed shall attach the certificate to the judgment roll, and enter a minute of the judgment of the Supreme Court on the docket against the original entry. In cases of appeal from an order, the Clerk shall enter at length in the records of the Court the certificate received, and minute against the entry of the order appealed from a

reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified, as the case may be, by the Supreme Court, on appeal.

1. The Court below cannot refuse to give effect to the judgment of this Court; and a judgment entered by the clerk, in such case, is just as binding as if entered in the Supreme Court itself. *McMillan v. Richards*, 12 Cal. 467.

2. Where a case is appealed from the District Court to the Supreme Court, and the Supreme Court reverses the judgment of the District Court, and directs the entry of a final judgment, such judgment can be entered by the clerk of the District Court in the vacation. *Id.*

3. The act of the clerk in entering the judgment is a mere ministerial act. *Id.*

4. The *remittitur* from this Court is by the direction of the three hundred and fifty-eighth section of the Practice Act, to be attached by the clerk of the District Court to the judgment roll, and a minute of the judgment entered on the docket against the original entry; the judgment of this Court then stands as the judgment of the District Court. If it award a new trial, the clerk will place the cause on the calendar; if costs, he will, on the application of the party, issue execution for the same. *Mayor, etc., of Marysville v. Buchanan*, 3 Cal. 212.

5. The District Court has no authority to prevent the immediate execution of the judgment of this Court so remitted. *Id.*

6. The judgment of this Court upon appeal, and the costs consequent thereon, is final. *Id.*

7. The clerk of this Court, in entering up the judgment, adds the words "with costs," and annexes to the *remittitur* a copy of the bill of costs filed. These words are a sufficient awarding of costs for the clerk of the Court below to issue execution for the same. *Id.*

8. This Court loses all control and jurisdiction over a case after the *remittitur* has been filed in the Court below. *Blanc v. Bowman*, 22 Cal. 23.

9. A motion, therefore, to vacate a judgment, on the ground that it was not rendered by the proper members of the Court, cannot be entertained after the *remittitur* has been filed below. *Id.*

10. District court has no power to modify judgment of supreme court—*Argenti v. City of San Francisco*, 30 Cal. 58; *Meyer v. Kohn*, Oct. T. 1867.

TITLE XXXI.

CHAPTER III.—*Appeals to the Supreme Court from the County Court.*

SECTION 359. Appeal may be taken from county Court, in certain cases.

360. Security on appeal shall be the same as provided in preceding chapter.

361. Appeals may be brought to a hearing on notice.

362. Appellant shall furnish papers on appeal.

§ 359. *1* *Appeal may be taken from County Court, in certain cases.*

An appeal may be taken to the Supreme Court from a final judgment of the County Court.

Firstly—In an action of forcible entry and detainer ; in an action to prevent or abate a nuisance ; in a proceeding in insolvency ; in an action wherein the legality of any tax, impost, assessment, toll, or municipal fine is in question ; and in any special case within the appellate jurisdiction of the Supreme Court over which the Legislature may require said County Court to exercise jurisdiction.

Secondly—From an order granting or refusing a new trial ; from an order granting or dissolving, or an order refusing to grant or dissolve an injunction ; and from any special order made after final judgment in the cases in this section before enumerated.

¹Amended 1853, 277 ; 1854, 93 ; 1865-6, 846.

1. No appeal was allowed by law from a County Court to the Supreme Court, prior to the first day of July, 1854. *Middleton v. Gould et al.*, 5 Cal. 190.

2. An objection that a County Court has no jurisdiction in cases on appeal, where no appeal bond is given as required by the statute, should be made in the Court below. It is too late to raise the question here. *Howard v. Harman*, 5 Cal. 78.

3. Where such an objection is made within the proper time, it is the duty of the presiding Judge to hear the excuse of the party failing to produce it, and if sufficient, to allow him to file a bond. *Id.*

4. Where a party appealed from a Justice's Court to a County Court, and the Justice neglected to send up with the record the notice of the appeal : *Held*, that it was error to refuse to allow appellant the opportunity of moving to compel the Justice to send it up, by peremptorily dismissing the appeal. *Sherman v. Rolberg*, 9 Cal. 17.

5. The Supreme Court has jurisdiction to hear and determine appeals from the judgment of the County Court, on questions of fraud made on the petition of an insolvent for a discharge from his debts. *Fisk v. His Creditors*, 12 Cal. 281.

6. A refusal by the County Court, on appeal from a Justice, to permit an amendment of the complaint, is matter of discretion, and there being no affidavit of materiality, nor any showing of the importance of the amendment, this Court will not interfere. *Canfield v. Bates*, 13 Cal. 606.

7. Where, in an action of forcible entry and detainer, the judgment is for the possession of the premises, and ninety-four dollars, treble damages, besides costs—the title not being involved—*query*, whether the Supreme Court has jurisdiction of an appeal from the County Court. *Paul v. Silver*, 16 Cal. 73.

8. No appeal will lie from a judgment for two hundred dollars, costs and per centage. The amount must exceed two hundred dollars—that is, the amount in dispute. Costs and per centage are only incidental to the action. *Zabriskie v. Terry*; *Votan v. Reese et al.*, 20 Cal. 89; *Dumphy v. Guindon*, 13 Id. 28. [See *Meeker v. Harris*, 23 Id. 285.]

9. The order of a County Court dismissing an appeal from a Justice's Court in an action of forcible entry and detainer, is a final judgment from which an appeal may be taken to the Supreme Court. *Zoller v. McDonald*, 23 Cal. 136.

10. The Constitution gives the Supreme Court jurisdiction on appeal from judgments rendered in contested election cases in the County Courts. *Knowles v. Yeates*, 31 Cal. 82.

11. The Supreme Court has appellate jurisdiction from a judgment of the County Court rendered in an election contest. *Day v. Jones*, 31 Cal. 261.

§ 360. ¹*Security on appeal shall be the same as in preceding chapter.*

Security shall be given upon such appeals in the same manner, to the same extent, and with the same effect, as in appeals to the Supreme Court from the District Court from judgments or orders of a similar character, and like justification on the part of the sureties may be required.

¹Amended 1854, 93; 1866-6, 849. See *ante*, § 348 to 356, inclusive, and notes.

§ 361. *¹Appeal may be brought to a hearing on notice.*

Appeals from the County Courts shall be brought to a hearing in the same manner and upon like notice as appeals from the District Court.

¹Amended 1854, 93. See *ante*, § 357 and notes.

§ 362. *¹Appellant shall furnish papers on appeal.*

The appellant shall furnish the papers for the Supreme Court in the same manner as upon appeals from the District Court.

¹Amended 1853, 277; 1854, 93.

TITLE XXXII.

CHAPTER IV.*—*Appeals to the District Courts from the Probate Courts.*

SECTION 363. Appeals may be taken from Probate Court.

364. Time within which appeal shall be taken.

365. Appeals shall be heard as soon as possible.

§ 363. *Appeals may be taken from Probate Court.*

An appeal may be taken from a Probate Court to the District Court of the district in which the Probate Court is held, in the following cases :

1st. From an order or decree admitting a will to probate, or refusing the same ;

* STATUTES OF 1855, 301; WOOD'S DIGEST, 421, ARTICLE 2354.

SECTION 297. [1861]. An appeal may be taken to the Supreme Court, from an order, decree or judgment of the Probate Court, where the estate or amount in dispute exceeds two hundred dollars, in the following cases:

1st. For, or against granting or revoking, letters testamentary, or of administration, or of guardianship;

2d. From an order setting apart property, or making an allowance for the widow or children ;

3d. From an order granting letters testamentary or of administration, or appointing a guardian of an infant, or of an insane person, or of a person incompetent to manage his property, or refusing to grant such letters, or to make such appointment, or making such letters or appointment ;

4th. From an order directing the sale or conveyance of real property ;

5th. From an order or decree by which a debt, claim, legacy, or distributive share is allowed, or payment thereof directed ; or by which such allowance or direction is refused ;

6th. From an order made on the settlement of an executor, administrator or guardian.

See Belknap's Probate Law, pp. 21-22; also pp. 159-161.

§ 364. *Time within which appeal shall be taken.*

2d. For, or against, admitting a will to probate;

3d. For, or against, the validity of a will, or revoking the probate thereof;

4th. For, or against, setting apart property, or making an allowance for a widow or child;

5th. For, or against, directing the sale or conveyance of real property;

6th. On settlement of any account of an executor, or administrator, or guardian;

7th. For, or against, declaring, allowing, or directing, the payment of a debt, claim, legacy or distributive share.

SEC. 298. [1855]. The appeal may be taken within sixty days after the order, decree or judgment is made and entered in the minutes of the Court; it shall be made by filing with the Clerk of the Probate Court, a notice stating the appeal from the order, decree or judgment, or some specific part thereof, and by executing an undertaking, or giving surety, on such appeal in the same manner, and to the same extent, as upon an appeal to the Supreme Court from the District Court; provided, the appeal of an executor or administrator who has given an official bond shall be complete and effectual without the undertaking; provided also, from an order, decree or judgment, made since the first day of October, eighteen hundred and fifty-four, the appeal may be taken within sixty days after the passage of this act. After the appeal is determined, suit may be brought and prosecuted to judgment, on the undertaking, in the name of any party beneficially interested therein.

SEC. 299. When a party who has a right to appeal, wishes a statement of the case to be annexed to the record, he shall prepare and file the same within twenty days after the entry of the order, decree or judgment; provided, if the order, decree or judgment has been made since the first day of October, eighteen hundred and fifty-four, he shall prepare and file such statement within twenty days after the passage of this act.

SEC. 300. The provisions, as amended, of Chapter I, Title IX, of the act entitled "an act to regulate proceedings in civil cases in the Courts of Justice in this State," passed April 29th, 1851, so far as the same do not conflict with the provisions of this act, shall be applicable to appeals from the Probate Court.

SEC. 301. [1851]. When the order or decree appointing an executor, or administrator, or guardian, shall be reversed on appeal, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he shall qualify, shall be as valid as if such order, or decree, had been affirmed. When any executor, or administrator, resigns, or is removed, a successor may be appointed, if a necessity therefor exists, without again proving the death and residence of the testator or intestate.

SEC. 302. [1855.] Where it is not otherwise prescribed by law, the Probate Court or the Supreme Court, on appeal, may in its discretion, order costs to be paid by any party to the proceedings, or out of the estate, as justice may require; execution for the costs may issue out of Probate Court.

The appeal shall be taken within thirty days after the order or decree appealed from is entered with the Clerk.

365. *Appeals shall be heard as soon as possible.*

[1854.] Appeals from the Probate Court shall be brought to a hearing at the earliest period practicable. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the District Court may order the appeal to be dismissed.

¹Amended 1854, 93.

1. The District Court has only original jurisdiction; it has no appellate powers. *Caulfield v. Hudson*, 3 Cal. 389; *Zander v. Coe*, 5 Cal. 239.

TITLE XXXIII.

CHAPTER V.—*Appeals to the County Courts from Justices' and Recorders' Courts.*

SECTION 366. Appeals may be taken on questions of law or on questions of law and fact.

367. Miscellaneous provisions on trials in County Courts.

§ 366. *Appeals may be taken on questions of law or on questions of law and fact.*

Judgments, in all civil cases rendered by Justices', Recorders', and Mayors' Courts, may be [reviewed] by the County Court, when the appeal is taken on questions of law, alone, it shall be heard on a statement of the case prepared as prescribed in Title XVI of this act. When the appeal is taken on questions of fact, or on questions of both law and fact, the action shall be tried anew in the County Court, and either party may, on such trial, demand a jury.

¹Amended 1853, 277; 1854, 93. See post, §§ 624-628; Bancroft's Forms, 664.

1. On appeal from a Justice's Court to the County Court, on questions of law alone, if a new trial be ordered it should take place in the County Court. *People v. Freslon*, 8 Cal. 517.

2. The County Court has the sole appellate jurisdiction in all cases, civil and criminal, arising in Justices' Courts, subject to such restrictions as the legislature may impose, by making the decisions of the Justice final in such cases as may be determined by law. *People v. Fowler*, 9 Cal. 86.

3. A defendant who has been properly served with process issued out of a Justice's Court, who allows judgment to be taken against him by default, admits the facts alleged in the complaint, and no appeal will lie from such judgment in reference to such facts, there being no issue of fact. *The People ex rel. Jones v. The County Court of El Dorado County*, 10 Cal. 19.

4. Nor could he ask the County Court to hear the appeal on questions of law, unless there was a statement filed of the grounds on which he intended to rely. *Id.*

5. In such case, where the defendant appeals on questions of both law and fact, he is not entitled to a trial *de novo*. *Id.*

6. In all cases the issue of fact must be made in the Court of original jurisdiction. The County Court can only retry the issue tried in the Court below. This is what is meant by a trial anew in the County Court, under section six hundred and twenty-six of the Practice Act. *Id.*, 11 Cal. 328.

7. Where a cause is heard on appeal in a County Court, for the purpose of trying the same *de novo*, it is the duty of the Court to proceed with the trial on the merits of the case. *Coyle v. Baldwin et al.* 5 Cal. 75.

§ 367. ¹Miscellaneous provisions on trials in County Courts.

Upon an appeal heard upon a statement of the case the County Court may; review all orders affecting the judgment appealed from, and may set aside [or confirm, or modify any or all of the proceedings subsequent to, and dependent upon, said judgment, and may, if necessary or proper, order a new trial. When the action is tried anew, on appeal, the trial shall be conducted, in all respects, as trials in the District Court. The provisions of this act as to changing the place of trial, and all the provisions as to trials in the District Court, shall be applicable to trials, on appeal, in the County Court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the County Court, after notice, may order the appeal to be dismissed. Judgments rendered in the County Court on appeal shall have the same force and effect, and be enforced in the same manner as judgments in actions commenced in the District Court.

¹Amended 1854, 93.

1. Where a motion is made in the County Court to dismiss an appeal, on the grounds that the undertaking filed is insufficient, and before the determination thereof the other party offers to amend his undertaking: *Hald.* that it is error to refuse to allow him so to do. *Cunningham v. Hopkins*, 8 Cal. 33.

2. When an appeal is taken on questions of fact alone, the appellate Court will not disturb the verdict, when there is any evidence to support it. *Escotte and Wife v. Merle*, 9 Cal. 94.

3. Where in suit in a Justice's Court for damages to real property, the answer put in issue the ownership of the property, and the defendant moved to transfer the case to the District Court for trial, which motion was refused; and after trial before the Justice, judgment was rendered for plaintiff, and the defendant appealed to the County Court, where the judgment was set aside,

and an order made transferring the case to the District Court, where, after trial, plaintiff again had judgment: *Held*, that the County Court had authority, under sections five hundred and eighty-one and three hundred and sixty-seven of the Practice Act, to transfer the case to the District Court; that the effect of the appeal to the County Court was to vest it with authority to make all orders necessary for the determination of the case; and as the case was to be tried *de novo*, and the County Court was incompetent, under the statute, to try it, the transfer to the District Court was necessary. *Cullen v. Langridge*, 17 Cal. 87.

4. The fact that the sum sued for in such case was only two hundred dollars, does not deprive the District Court of jurisdiction. The fact that the title to real property was involved, and not the sum sued for, establishes the jurisdiction. The issue upon this question of title had first to be found in favor of plaintiff, before he could recover any damages. This issue involved, not only the right of plaintiff to recover, but the entire value of the property; and there being nothing in the record to show this value to be insufficient to support the jurisdiction, the presumptions are in favor of the validity of the proceedings. *Id.*

5. If the appeal be not prosecuted, the same may be dismissed after notice in the appellate Court (§ 367). The provisions of section six hundred and twenty-seven, in reference to the payment of fees, refer to the making out of papers. The payment or tender of the fees does not strictly constitute a condition of appeal, but a condition precedent to the sending up the papers; but this condition may be waived by the Justice, or the fees may be paid at any time, so as to bring the case up before the County Court within the period limited by the rules of that Court. *People ex rel. Hamilton v. Harris*, 9 Cal. 573.

6. Where, in suit before a Justice of the Peace, defendant answers disputing plaintiff's claim, and afterwards, on a day set for trial, plaintiff being present, but defendant absent, and no one appearing for him, the Justice renders judgment for plaintiff, without evidence and "by default," as the docket reads: *Held*, that if the Justice erred in his judgment, either upon the merits or as to form, the remedy is by appeal, and that such error cannot be corrected by bill in equity to set aside the judgment and enjoin execution and sale thereon. *Hunter v. Hoole et al.*, 17 Cal. 418.

7. Where, in a Justice's Court, for damages to real property, the answer put in issue the ownership of the property, and the defendant moved to transfer the case to the District Court for trial, which motion was refused; and after trial before the Justice, judgment was rendered for plaintiff, and the defendant appealed to the County Court, where the judgment was set aside, and an order made transferring the case to the District Court, where, after trial, plaintiff again had judgment: *Held*, that the County Court had authority, under sections five hundred and eighty-one and three hundred and sixty-seven of the Practice Act, to transfer the case to the District Court; that the effect of the appeal to the County Court was to vest it with authority to make all orders necessary for the determination of the case, and, as the case was to be tried *de novo*, and the County Court was incompetent under the statute to try it, the transfer to the District Court was necessary. *Cullen v. Langridge et al.*, 17 Cal. 67.

TITLE XXXIV.

MISCELLANEOUS PROCEEDINGS.

CHAPTER I.—*Proceedings against joint debtors.**

SECTION 368. Parties not summoned in action on joint contract may be summoned after judgment.

369. Summons, in that case, what to contain and how served.

370. Affidavit to accompany summons.

371. Answer, when filed and what it may contain.

372. What will constitute the pleadings in the case.

373. Issues how tried, and verdict what to be.

§ 368. *Parties not summoned in action on joint contract, may be summoned after judgment.*

When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding, as provided in section thirty-two, those who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons.

See §§ 32, 145. N. Y. Code, § 375.

§ 369. *Summons, in that case, what to contain and how served.*

The summons, as provided in the last section, shall describe the judgment, and require the person summoned to show cause why he should not be bound by it, and shall be served in the same manner and returnable within the same time as the original summons. It shall not be necessary to file a new complaint.

Abb. Forms, 1829-1830.

§ 370. *Affidavit to accompany summons.*

The summons shall be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment; or some part thereof remains unsatisfied and shall specify the amount due thereon.

Abb. Forms, 1829-1830.

§ 371. *Answer, when filed and what it may contain.*

* This chapter is applicable to Justices' Courts.

Upon such summons the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the Statute of Limitations.

Abb. Forms, 1832.

§ 372. *What will constitute the pleadings in the case.*

If the defendant in his answer deny the judgment, or set up any defense, which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, shall constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, shall constitute written allegations.

§ 373. *Issues how tried, and verdict what to be.*

The issues formed may be tried as in other cases; but when the defendant denies, in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it shall be for the amount remaining unsatisfied on such original judgment, with interest thereon.

Abb. Forms, 1833-1834.

TITLE XXXV.

CHAPTER II.—*Confession of judgment without action.*

SECTION 374. Judgment may be confessed for debt due, or contingent liability.

375. Statement in writing, and form thereof.

376. Filing statement, and entering judgment.

§ 374. *Judgment may be confessed for debt due, or contingent liability.*

A judgment by confession may be entered without action,

either for money due, or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

N. Y. Code, § 382.

1. A judgment may be entered by confession for the amount specified in the award, in the same way that it may for the sum mentioned in a bond, note or other instrument, but that is a judgment by confession. *Gunter v. Sanchez*, 1 Cal. 48.

§ 375. *Statement in writing, and form thereof.*

A statement in writing shall be made, signed by the defendant, and verified by his oath to the following effect:

1st. It shall authorize the entry of judgment for a specified sum ;

2d. If it be for money due, or to become due, it shall state concisely the facts out of which it arose, and shall show that the sum confessed therefor is justly due, or to become due ;

3d. If it be for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and shall show that the sum confessed therefor does not exceed the same.

N. Y. Code, § 383. *Bancroft's Forms*, 568.

1. **Generally.**—Where a judgment was rendered by confession in open Court upon an allegation of indebtedness and appearance of the parties, whatever errors intervened, they cannot, at the instance of one not a party to the judgment, be invoked to set aside, or show the judgment was a nullity. *Cloud v. El Dorado Co.*, 12 Cal. 133.

2. The Legislature did not intend any more definiteness or particularity in cases of confession of judgment than in complaints upon the same cause of action in the ordinary course of procedure. *BALDWIN, J. Cordier v. Schloss*, 13 Cal. 143.

3. Where a judgment by confession is attacked by a creditor, as fraudulent against him, on the ground that the object of the debtor and the judgment creditor was to assist the debtor in forcing a compromise with his other creditors, rather than to enforce the judgment, the complaint must plead this ground of objection to the judgment. A general averment that the intent was to hinder, delay and defraud, is insufficient. *Meeker v. Harris*, 12 Cal. 218.

4. Such general averment of fraud will not put the adverse party on his defense. *Id.*

5. An insolvent debtor, wishing to prefer a particular creditor, may give him a confession of judgment, with the agreement between them that judgment shall not be entered on the confession if the debtor succeeds in obtaining from his other creditors an extension—the creditor himself, in that event, also to give time ; but that if the other creditors refuse such extension and attempt to attach, then that the judgment may be entered on the confession and execution issued. Such confession, not used nor intended to be used to influence the negotiations with the other creditors, but simply designed to secure the preferred creditor, and at the same time to extend as much leniency to the debtor as is consistent with the creditor's own security, is valid. *Meeker v. Harris*, 19 Cal. 278.

6. **Insufficient statements.**—A statement for confession of judgment, to the effect that the indebtedness is upon a note, etc., is insufficient. So where

the statement is, that the indebtedness is for goods sold and delivered, and money had and received, it is insufficient in this: that it does not show the kind, or quantity, or price of the goods, or time of sale, or when the money was received, or under what circumstances, or how much of the indebtedness is for money, and how much for goods; and the judgment confessed is *prima facie* fraudulent. *Cordier v. Schloss*, 18 Cal. 576.

7. A statement, under the three hundred and seventy-fifth section of the Practice Act, for confession of judgment, to the effect that plaintiffs are owners of a note, that the note was given for goods sold and delivered by plaintiffs to defendants, and money had and received by defendants, is insufficient, and the judgment rendered thereon *prima facie* fraudulent against creditors. *Id.*

8. Whether each of the defects above named would be fatal to the judgment, not decided; but the failure to state the amounts due, severally, for goods and for money, would be fatal, just as such an averment is insufficient in an ordinary complaint. *Id.*

9. If the statement upon which a voluntary confession of judgment is made does not correctly describe the debt, the judgment is void as to the creditors of the judgment debtor. *Wilcoxson v. Boston*, 27 Cal. 233.

10. A judgment rendered upon confession of the debtor, and at his instance, without any request on the part of the creditor, and without his knowledge, is void as between the parties, and will not bar an action brought by the creditor on the same cause of action, nor will it estop the debtor from denying all the facts set forth in it. *Id.*

11. When a debtor confesses judgment without the knowledge or request of the creditor, and the creditor thereafter ratifies it, and attempts to enforce it, it will become binding between the parties to it by force of the ratification, but such ratification cannot affect rights acquired by other parties prior to the ratification. *Id.*

12. The execution and delivery of a note by the debtor to his creditor for a sum greater than is actually due for the purpose of defrauding other creditors of the debtor, and the voluntary confession of a judgment in the same by the debtor, renders the judgment fraudulent and void as to the other creditors of the debtor. *Id.*

13. A voluntary confession of a judgment, made upon a *bona fide* debt by the debtor in favor of the creditor, without the knowledge of the creditor, and the issuance of an execution thereon at the request of the debtor, and a levy on the debtor's goods by virtue thereof—also without the knowledge of the creditor—for the purpose of enabling the creditor to obtain priority over the creditors of the debtor, is such a fraud upon the other creditors as renders the judgment null and levy void, as to an attachment or execution in favor of the other creditors, afterwards levied on the same property. *Id.*

14. **Void judgments.**—A judgment confessed for the purpose of hindering, delaying, or defrauding creditors, is void as to such creditors. *Ryan v. Daly*, 6 Cal. 238.

15. A confession of judgment to a *bona fide* creditor, and the issuance of execution and making levy under the same by the judgment debtor, without the knowledge of the judgment creditor, done with the knowledge that another creditor is about to attach, and for the purpose of defeating his attachment, is void as to the attaching creditor. *Id.*

16. Where judgment is confessed on a note, a portion of the consideration being advanced from time to time after the date of the note, which drew interest on the whole amount from date, a portion of the interest is fraudulent, and the entire note is void as against creditors. *Scales v. Scott*, 13 Cal. 76.

17. Under the Practice Act of 1850, a judgment by confession is invalid, unless the instrument authorizing its entry is signed by each of the persons against whom it authorizes judgment to be entered. *Chapin v. Thompson*, 20 Cal. 681.

18. Where, under said act, two persons signed a confession of judgment against themselves and two others: *Held*, that the judgment thereon being

void as to those not signing, was equally so as to those signing, and that the authority being to enter a judgment against four, no judgment thereunder could be entered against a less number. *Id.*

19. **Judgments, prima facie, void.**—In a confession of judgment, the omission to fully comply with the statute to set forth explicitly the facts and circumstances upon which the debt was incurred, does not *ipso facto* make the judgment void; it merely throws the burden of proof on the judgment creditor, if his judgment is contested by other creditors, of proving that his judgment was fair and not fraudulent. *Richards v. McMillan*, 6 Cal. 419.

20. But such a failure to make all the disclosures required by the statute is *prima facie* evidence of fraud. *Id.*

21. *Richards v. McMillan* (6 Cal. 419), holding that the omission, in a confession of judgment, to state the facts out of which the indebtedness arose, etc., is strictly in accordance with the statute, does not render the judgment a nullity, but is simply *prima facie* evidence of fraud, affirmed. *Cordier v. Schloss*, 18 Cal. 576.

22. A statement for confession of judgment to the effect that the indebtedness is upon a note, etc., is insufficient. So where the statement is that the indebtedness is for goods sold and delivered, and money had and received, it is insufficient in this: that it does not show the kind, or quantity, or price of the goods, or time of sale, or when the money was received, or under what circumstances, nor how much of the indebtedness is for money and how much is for goods; and the judgment confessed is *prima facie* fraudulent. *Id.*

23. Whether each of the defects above named would be fatal to the judgment, not decided; but the failure to state the amounts due, severally, for goods and for money, would be fatal, just as such an averment is insufficient in an ordinary complaint. *Cordier v. Schloss et al.*, 18 Cal. 576.

24. **Judgments; how, when, and by whom may be set aside.**—An application by a judgment creditor to set aside his confession of judgment, should show that the claim was not just, and that the judgment ought not to have been confessed. *Arrington v. Sherry*, 5 Cal. 514.

25. A junior judgment creditor has no right to join with the defendant in an application to set aside such confessed judgment. He must resort to a Court of chancery if he is dissatisfied. *Id.*

26. A junior judgment creditor must resort to a Court of equity if he is dissatisfied with the *bona fides* of the confession of judgment. *Id.*

27. In a suit to set aside a judgment confessed by a party to defraud his creditors, it is not necessary that plaintiff should be either a judgment or execution creditor. A lien acquired by attachment suffices. A slight mistake in the computation of interest, the date being given, is no evidence of fraud. *Scales v. Scott*, 13 Cal. 76.

§ 376. *Filing statement and entering judgment.*

The statement shall be filed with the Clerk of the county in which the judgment is to be entered, who shall indorse upon it, and enter in the judgment book a judgment of such Court for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment indorsed, shall thereupon become the judgment roll.

Bancroft's Forms, 569.

TITLE XXXVI.

CHAPTER III.—*Submitting a controversy without action.*

SECTION 377. Controversy, how submitted without action.

§ 378. Judgment on, as in other cases, but without costs prior to notice of trial.

§ 379. Judgment may be enforced or appealed from as in an action.

§ 377. *Controversy, how submitted without action.*

Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any Court which should have jurisdiction, if an action had been brought. But it must appear, by affidavit, that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The Court shall thereupon hear and determine the case, and render judgment thereon, as if an action were depending.

N. Y. Code, § 372.

1. Where the parties to a controversy make an agreed case, under the three hundred and seventy-seventh section of the Practice Act, which is submitted for decision to District Court, the consideration of the Court is restricted to the facts submitted in the case. *Crandall v. Amador County*, 20 Cal. 72.

2. Where the plaintiff claimed that defendant was indebted to him, and, under the section above referred to, a case was made and submitted stating the facts agreed upon between the parties, upon which the District Court decided that plaintiff's demand was not established without proof or other additional facts: *Held*, that it was error for the Court instead of rendering judgment for the defendant to make an order based upon the supposition that plaintiff establish such other facts. *Id.*

3. Where an appeal is taken to the Supreme Court from a decision of a Justice's Court, upon a case submitted on an agreed statement, without action under the three hundred and seventy-seventh section of the Practice Act, the transcript on appeal must contain a copy of the affidavit required by the same section showing the reality of the controversy and good faith of the proceeding. *Mellois v. Chains*, 20 Cal. 679.

4. Where, instead of this affidavit, the record only showed an allegation in the agreed statement on appeal that the cause was heard in the Court below on an agreed statement of facts, and the affidavit of the defendant that the controversy was real, the appeal was dismissed. *Id.*

§ 378. *Judgment on, as in other cases, but without costs, prior to notice of trial.*

Judgment shall be entered in the judgment book, as in other cases, but without costs, for any proceeding prior to the

award shall be made. When so entered, the submission shall not be revoked without the consent of both parties. The arbitrators may be compelled by the Court to make an award, and the award may be enforced by the Court in the same manner as a judgment. If the submission be not made an order of the Court, it may be revoked at any time before the award is made.

1. A stipulation in the submission that neither party should appeal, and a power of attorney to confess judgment pursuant to the award, will not bar an appeal from a judgment on the award; especially under our system, where law and equity are blended together. *Muldrow v. Norris*, 2 Cal. 74.

2. The report of a referee, and the award of an arbitrator, are in all essentials the same. *Grayson v. Guild*, 4 Cal. 122.

3. Where the parties entered into a submission to arbitration, in which it was stipulated that the award be entered as the judgment of the County Court: *Held*, that it was void *in toto*, that Court having no jurisdiction over the subject matter of the award. *Williams v. Wallon*, 9 Cal. 142.

4. Where a submission to arbitration is made an order of Court, under the Practice Act, the clerk may enter judgment on the award, in due time, without any further order of the Court. *Carsley v. Lindsay*, 14 Cal. 390.

5. An agreement in writing between two parties, to submit matters in difference between them to an arbitrator, with the power to award and adjudge all matters in difference between them, and to make an award in writing, and that his award when made may be entered as a judgment of any Court of record having jurisdiction, does not give any Court jurisdiction of the parties litigant, or of the subject matter of the controversy, unless the agreement further stipulate that the submission may be entered as an order of Court, and the submission and stipulation are filed with the clerk, and the clerk enter in his register of actions a note of the submission, with the names of the parties, the name of the arbitrator, etc., as required by the three hundred and eighty-second section of the Practice Act. *Ryan v. Dougherty*, 30 Cal. 219.

§ 383. Powers of arbitrators.

Arbitrators shall have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon.

1. If the agreement to submit matters in difference to an arbitrator provides that the submission may be made an order of Court, and the clerk makes the proper entries in his register of actions, the arbitrator must make his award within the time limited in the agreement, or both the arbitrator and Court lose jurisdiction of the case, unless the parties stipulate in writing to extend the time. *Ryan v. Dougherty*, 30 Cal. 218.

2. When matters in dispute are submitted to arbitration, with power for the arbitrators to appoint an umpire, the arbitrators have a right to select the umpire, either before or after the investigation of the matter has commenced, even though the articles of submission contain a clause providing for such selection in the event of a disagreement between the arbitrators. *Dudley v. Thomas*, 23 Cal. 365.

3. Arbitrators have the power to award costs, though no mention be made of costs in the article of submission. *Id.*

4. After an award has been once made and delivered, the arbitrators cannot afterwards alter the same, even to correct mistakes, without the consent

of the parties; but the making of a new and supplementary paper, and attaching the same to the award after it has been delivered, does not vitiate the original award, and may be treated as surplusage. *Id.*

§ 384. *Majority of arbitrators may determine any question; they shall be sworn.*

All the arbitrators shall meet and act together during the investigation; but when met, a majority may determine any question. Before acting, they shall be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties, in relation to the matters in controversy, and to make a just award according to their understanding.

1. Arbitrators have no common law powers when appointed in the mode provided by statute. *Williams v. Walton*, 9 Cal. 145.

§ 385. *Award to be in writing; when judgment to be entered.*

The award shall be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the Court, the award shall be filed with the Clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit, showing that notice of filing the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award shall be entered by the Clerk in the judgment book, and shall thereupon have the effect of a judgment.

1. The ordinary mode of enforcing an award is by action, and it seems where no statute exists authorizing the Court to enter judgment on an award, upon motion, that the Court has no right to proceed in that way; and a consent to submit a matter to arbitration does not imply a consent that the party in whose favor the award is made may enter judgment upon it in Court as a matter of course. *Gunter v. Sanchez et al.*, 1 Cal. 45.

2. Instance of an award not void for uncertainty. *Carsley v. Lindsay*, 14 Cal. 390.

3. An award cannot be impeached because contrary to law and evidence. The Practice Act (§ 386, et seq.) prescribes the sole ground for vacating his award. Certainly not, if the facts were not brought before him. *Id.*

4. Where a submission to arbitration is made an order of Court, under the Practice Act, the clerk may enter judgment on the award in due time, without any further order of the Court. *Id.*

5. *Heslop v. San Francisco* (4 Cal. 1), in this respect overruled. *Id.*

6. That the arbitrator did not act upon all the items or property of a partnership, is no ground for vacating his award. Certainly not, if the facts were not brought before him. *Id.*

7. An award rendered upon a fair arbitration of a matter in dispute between two parties, and for a long time after concurred in, must be held to be conclusive. *Jarvis v. Fountain Water Co.*, 5 Cal. 179.

8. An award bad in part may be enforced for the part that is good, if not attacked for fraud; and the matter is divisible. *Muldrow v. Norris*, 2 Cal. 74.

9. The Court will not disturb the award of an arbitrator unless the error complained of, whether of law or fact, appear on the face of the award. *Tyson v. Wells*, 2 Cal. 122, overruled, as to a report of a referee, in *Cappe v. Brissolara*, 19 Cal. 607.

10. If a judgment on an award of arbitrators is entered by the clerk at the request of the party in whose favor it is rendered, within less than five days after the award is filed, and without notice to the other party, the prevailing party cannot afterwards question its validity on the ground that it was irregularly entered. *Hoogs v. Morse*, 31 Cal. 128.

11. If the arbitrators award that one of the parties shall pay to the other a sum certain, and also that the parties shall execute to each other mutual releases of all actions, etc., the tender of a release, as provided by the award, is not a condition precedent to the right to bring an action to recover the money. *Dudley v. Thomas*, 23 Cal. 365.

12. The award of money is absolute and unconditional; but the award of releases is different, for they are concurrent acts, and neither party can compel the other to execute a release without the tender of a release by himself. *Id.*

§ 386. Award may be vacated in certain cases.

The Court, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion:

1st. That it was procured by corruption or fraud;

2d. That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced;

3d. That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed.

1. The rule is general that arbitrators must pass upon all matters submitted, or their award will be invalid. If several matters are specified in the submission, and the award does not disclose that each is determined, it is defective on its face, and can be set aside on motion. But if the submission is general of all matters in controversy, without specification, it is not necessary that the award should embrace any matters except those which are laid before the arbitrators. These last, however, must be passed upon, or the award will be void *in toto*, and be set aside upon a proper showing of the omission. *Muldrow v. Norris*, 12 Cal. 331.

2. If the submission provide that an award upon the matters submitted be made, or the condition of the bond be that the parties are bound, provided the award of such matters be made, then such proviso extends to all the matters submitted, and operates to render the submission conditional, and the award binding only in case the arbitrators pass upon every subject, either specially referred to them, or brought to their notice under the general terms of the submission. *Id.*

3. Where one of the principal matters in dispute, passed upon by the arbitrators, was subsequently set aside by a higher Court, and the judgment rendered upon the award vacated by reason of the error of the arbitrators in passing upon said matter, it left the award as though such item submitted had never been passed upon; and consequently, the award did not effect the purposes of the submission by settling all matters of controversy between the parties. The consideration which moved the parties to enter into the submission had failed, and hence the award is void. *Id.*

4. The award being void, a release of action, filed by one of the parties in pursuance of the submission, is also void. *Id.*

5. The doctrine that an award may be good in part and bad in part applies to instances where there has been an excess of power in arbitration by their attempting to determine matters not submitted, or where there is uncertainty or illegality in an independent and distinct matter forming no consideration for other parts of the award, and the settlement of which could not have contributed to induce the arbitration. *Id.*

6. A useless and invalid determination upon one item properly presented within the general terms of the submission, must, on principle, be as fatal to the entire action of the arbitrators as an omission, intentional, to notice the item at all. *Id.*

7. Instance of an award not void for uncertainty. *Carsley v. Lindsay*, 14 Cal. 390.

8. When arbitrators have published their award, any alteration whatever, without the consent of parties, will vitiate it; and this, though the alteration was to fix certain amounts left undetermined in the award. *Porter v. Scott*, 7 Cal. 312.

9. It is the duty of arbitrators to pass upon the whole subject in controversy; and if the terms of the award render a further inquiry necessary to ascertain a sum to be paid, or an act to be done, it is void. *Id.*

10. Arbitrators, under a general submission, are not bound to decide according to direct law; but where they intend to decide according to law, a mistake apparent on the face of the award is fatal. *Muldrow v. Norris*, 2 Cal. 74.

11. Courts of equity, in the absence of statutes, will set aside awards for fraud, mistake or accident; an award may be set aside for a mistake of law, when it appears on the face of the award. *Id.*

12. If arbitrators state the reasons of their award, it will be presumed they intend to decide according to law. *Id.* 79.

13. Where parties submit to an arbitrator they are presumed to know that his award will be final; and they must be required to exercise due diligence in procuring the evidence upon which to base a proper award. *Montifiori v. Engels*, 3 Cal. 431.

14. Where an award is objected to on the ground that it embraces matters not in fact submitted, though within the general terms of the submission, it lies with the objecting party to show affirmatively in what the arbitrators have exceeded their authority. Without such showing the award will be sustained. *Blair v. Wallace*, 21 Cal. 317.

15. Thus, where the agreement of submission recited a sale and resale of certain lands, out of which transaction disputes and misunderstandings had arisen, and the submission was of "all and every matter of dispute arising from or growing out of the transaction, aforesaid," an award, that one party receive from the other a certain amount of money and convey to him the lands mentioned, is *prima facie* authorized by the submission. *Id.*

16. If the party in whose favor an award of arbitrators is made, voluntarily takes judgment on the award, and then receives the amount of the judgment in satisfaction of it, this is a waiver of any errors or misconduct on the part of the arbitrators. *Hoogs v. Morse*, 31 Cal. 128.

§ 387. Court may, on motion, modify or correct the award.

The Court, may, on motion, modify or correct the award, where it appears:

1st. That there was a miscalculation in figures, upon which it was made, or that there is a mistake in the description of some person or property therein ;

2d. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted ;

3d. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

1. That the Court will not disturb the award of an arbitrator, or the report of a referee, unless the error complained of, whether of law or fact, appears on the face of the award or report. *Tyson v. Wells*, 2 Cal. 122, overruled in *Cappe v. Brizzolara*, 19 Cal. 607.

2. Where the object of the submission is to make an end of litigation, and the award is uncertain and incomplete upon its face, it defeats the object of the submission, and must be set aside. *Pierson v. Norman*, 2 Cal. 599.

§ 388. *Decision on the motion subject to appeal ; but not the judgment entered before motion.*

The decision upon the motion shall be subject to appear in the same manner as an order which is subject to appeal in a civil action ; but the judgment entered before a motion is made shall not be subject to appeal.

1. A stipulation that neither party will appeal is not binding. *Muldrow v. Norris*, 2 Cal. 74.

§ 389. *If submission be revoked and an action brought, what to be recovered.*

If a submission to arbitration be revoked, and an action be brought therefor, the amount to be recovered shall only be the costs and damages sustained in preparing for and attending the arbitration.

TITLE XXXVIII.

CHAPTER V.—*Offer of the defendant to compromise the whole or a part of an action.*

§ 390. *Proceedings on offer of defendant to compromise after suit brought.*

The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him, for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance, and the Clerk shall thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer shall be deemed withdrawn, and shall not be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he shall not recover costs, but shall pay the defendant's costs, from the time of the offer.

See N. Y. Code, § 385; Abb. Forms, 1692-3.

1. If judgment is entered upon the *cognovit*, and by its authority, then the amount acknowledged would have been the sum of the judgment; but where, upon complaint and answer denying the allegations thereof, the acknowledgment issued as evidence, interest may be given by way of damages. *Hirschfeld v. Franklin*, 6 Cal. 607.

2. A *cognovit* is good as an admission *in pais* after answer is filed. *Id.*

3. The true meaning of the statute (Practice Act, sec. 390) authorizing the clerk to enter judgment upon an offer on the part of defendant to suffer judgment for a specified sum, etc., is, that he can enter judgment only when the offer is made after action is brought by the filing of the complaint, and while pending; and where a party hands to the clerk the complaint, offer of judgment and notice of acceptance of the offer, at the same time, and thereupon the clerk enters judgment, it is void. *Crane v. Hirschfelder*, 17 Cal. 582.

TITLE XXXIX. (a) (b)

OF WITNESSES, AND OF THE MANNER OF OBTAINING EVIDENCE.

CHAPTER I.—*Of witnesses.*

SECTION 391. All persons may be witnesses, except as specified in this chapter.

392. No person shall be excluded for his religious belief. When a person may be excluded for interest.

393. The test of interest. A party may call the adverse party.

394. Persons who shall not be witnesses.

395. Husband and wife shall not be witnesses for or against each other.

396. Attorney shall not be examined as to a communication made by a client, without consent.

397. Nor a priest as to any confession.

398. Nor a physician as to any information necessarily acquired in that capacity.

399. Nor a public officer as to communications made in official confidence.

400. The Judge or any juror may be a witness.

401. When witness does not speak English, an interpreter shall be sworn.

§ 391. ¹*All persons may be witnesses except as specified in this chapter.*

All persons, without exception, otherwise than as specified in this chapter, may be witnesses in any action or proceeding. Facts which have heretofore caused the exclusion of testimony, may still be shown, for the purpose of affecting its credibility.

¹Amended 1863, 701.

§ 392. ¹*No person shall be excluded except, etc.*

No person shall be disqualified as a witness in any action or proceeding on account of his opinions on matters of religious belief, or by reason of his interest in the event of the action or proceeding as a party thereto, or otherwise; but the party or parties thereto, and the person in whose behalf such action or proceeding may be brought or defended, shall,

(a) [The provisions of this title are applicable to Justices' Courts. See post, § 620.]

(b) STATUTES 1868, p. 193.

SEC. 1. In any civil or criminal action or proceeding, a witness may be discredited or impeached, and for such purpose his general character for truth, honesty and integrity may be enquired into.

except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce*, or by deposition, or upon a commission, in the same manner and subject to the same rules of examination as any other witness, on behalf of himself, or either or any of the parties to the action or proceeding.

¹ Amended 1854, 94; 1863, 101.

§ 393. ¹ *Where defendant representative of a deceased person.*

An Act to amend an Act entitled "An Act to regulate proceedings in civil cases in the Courts of Justice of this State," passed April 29th, 1851. The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. § 393. *Section three hundred and ninety-three of said Act is hereby repealed.*

SEC. 2.—This Act shall take effect immediately.

[Approved April 2d, 1870.]

attestation of any instrument required by an act, shall anything contained in said section render any person who, in a criminal proceeding, is charged with the commission of any public offense, competent or compellable to give evidence therein for or against himself. (1)

¹ Amended 1854, 94; 1863, 701.

1. Where plaintiff claims under deceased, the admission of deceased in her lifetime, while living upon the property in controversy, to the effect that it belonged to or was in the possession of defendant, are competent evidence against plaintiff. *Bollo v. Navarro*, Oct. T. 1867.

2. The word "representative," used in the three hundred and ninety-third section of the Practice Act, as amended in 1863, applies to the executor or administrator of the estate of a deceased person, and also to the person or party who has succeeded to the right of deceased, whether by purchase or descent, or operation of law. *Davis v. Davis*, 26 Cal. 34.

§ 394. ¹ *Persons who shall not be witnesses.*

The following persons shall not be witnesses:

First—Those who are of unsound mind at the time of their production for examination.

Second—Children under ten years of age, who, in the opinion of the Court, appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

Third—Mongolians, Chinese, or Indians, or persons having

(1) Persons charged with criminal offenses shall, at their request, be deemed competent witnesses. Stat. 1865-6, p. 865.

one-half or more of Indian blood, in an action or proceeding wherein a white person is a party.

Fourth—Persons against whom judgment has been rendered upon a conviction for a felony, unless pardoned by the Governor, or such judgment has been reversed on appeal.

¹Amended 1854, 94 ; 1863, 60.

1. There is no precise age within which children are excluded from giving testimony. Their competency is to be determined, not by their age, but by the degree of their understanding and knowledge. *The People v. Bernal*, 10 Cal. 66.

2. It is for the Court to decide the question of their competency when they are offered as witnesses. *Id.*

3. If over fourteen years of age, the presumption is that they possess the requisite knowledge and understanding ; but if under that age, the presumption is otherwise, and it must be removed upon their examination by the Court, or under its direction and its presence, before they can be sworn. *Id.*

4. *People v. Hall* (4 Cal. 399), excluding Chinese witnesses in suits to which white persons are parties, affirmed. *Speer v. Ses Yup Co.*, 13 Cal. 73.

5. Where a witness, being sworn, stated that he was fourteen years old and a Chileno, and did not know "the obligation of an oath ;" whereupon the Judge explained to him the nature of such obligation, and he was then permitted to testify—the other party objecting that he did not know the obligation of an oath : *Held*, that the witness was competent. *Fuller v. Fuller*, 17 Cal. 605.

§ 395. *Husband and wife shall not be witnesses for or against each other.*

A husband may be a witness for or against his wife, and a wife may be a witness for or against her husband, and where husband and wife are parties to an action or proceeding they, or either of them, may be examined as witnesses in their own behalf, or in behalf of each other, or in behalf of any of the parties thereto, the same as any other witness ; but this section shall not apply to cases of divorce, neither shall any husband or wife be competent or compellable to disclose any communication made to him or her by the other during marriage. (1)

¹Amended 1863, 771.

§ 396. *An attorney shall not be examined as to communications made by a client without consent.*

An attorney or counselor shall not, without the consent of his client, be examined as a witness as [to] any communication made by the client to him, or his advice given thereon, in the course of professional employment.

(1) Husband and wife may become witnesses in criminal cases. Stat. 1865-6, p. 44.

1. Whether a communication by a client to his attorney was made in confidence is a question of fact, to be disposed of by the Court. *Hager v. Shindler*, 29 Cal. 48.

2. If the attorney, while managing a suit for the client, receives a deed of the client's property without consideration, and then at the client's request deeds the property to another person without consideration, these facts are not privileged communications, and the attorney may be required to disclose them as a witness in a suit by a creditor to cancel the deeds. *Id.*

3. If, pending the relation of client and attorney, the client communicates to the attorney a fact foreign to the object for which the attorney was retained, the communication is not confidential. *Id.*

4. If an attorney is retained in an action, and the client, after final judgment, makes disclosures respecting subjects of the foregone employment, the communications are not privileged. *Id.*

5. Confidential communications made by a client to an attorney, respecting the business he is employed to transact, are privileged, and the attorney cannot be compelled to disclose them. But statements made by the client to other persons at the time, or by other persons to him, are not privileged, and the attorney is bound to disclose them the same as any other witness. *Gallagher v. Williamson*, 23 Cal. 331.

§ 397. *Nor a priest as to a confession.*

A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

§ 398. *Nor a physician as to any information necessarily acquired in that capacity.*

A licensed physician, or surgeon, shall not, without the consent of his patient, be examined as a witness, as to any information acquired in attending the patient, which was necessary to enable him to prescribe, or act for, the patient; *provided*, however, in any suit, or prosecution, against a physician, or surgeon, for malpractice, if the patient, or party, suing, or prosecuting, shall give such consent, and any such witness shall give testimony, then such physician, or surgeon, defendant, may call any other physicians, or surgeons, as witnesses on behalf of defendant, without the consent of such patient, or party suing, or prosecuting.

Amended 1861, 305.

§ 399. *Nor a public officer as to communications made in official confidence.*

A public officer shall not be examined as a witness as to

communications made to him in official confidence, when the public interest would suffer by the disclosure.

§ 400. *The Judge, or any juror, may be a witness.*

The Judge himself, or any juror, may be called as a witness by either party; but in such case it shall be in the discretion of the Court or Judge to order the trial to be postponed or suspended, and to take place before another Judge or jury.

1. A case of forcible entry and detainer was legally brought before a Justice of the Peace, but he, being a witness in the cause, acting under the six hundred and twentieth section of the Practice Act, sent it to the mayor of M., who, having no jurisdiction, returned it to the successor of the Justice (who had in the meantime resigned), before whom it was decided. *Held*, that the mere fact of sending the cause to the mayor could not be subject of complaint, and that the judgment of the Justice's Court be sustained. *Davis v. Galles*, 2 Cal. 358.

§ 401. *When a witness does not speak English, an interpreter shall be sworn.*

When a witness does not understand and speak the English language, an interpreter shall be sworn to interpret for him. Any person, a resident of the proper county, may be summoned by any Court or Judge to appear before such Court or Judge to act as interpreter in any action or proceeding. The summons shall be served and returned in like manner as a subpoena. Any person so summoned shall, for a failure to attend at the time and place named in the summons, be deemed guilty of a contempt, and may be punished accordingly.

¹ Amended 1863, 495.

TITLE XL.

CHAPTER II.—*Manner of compelling the attendance of witnesses, and their rights and duties.**

- SECTION 402. Subpoenas may require witnesses alone, or to bring books, etc., but not more than thirty miles if out of the county.
403. Subpoena shall be issued, in what cases.
404. Service of subpoena.
405. Service on concealed witness.
406. Person present may be required to testify without subpoena.
407. A witness duly served shall attend as required.
408. Witness shall answer pertinent questions; exceptions.
409. Penalty for disobedience to subpoena, etc.
410. Witness disobeying subpoena shall forfeit one hundred dollars and all damages.
411. If witness fail to attend, the Court may issue a warrant.
412. If witness be a prisoner, an order for his examination or production may be made.
413. Such order can be made only upon affidavit.
414. When imprisoned, witness may be produced or his deposition taken.
415. Witness duly subpoenaed exempt from arrest in a civil action.
416. Arrest of witness under subpoena void; may be discharged on affidavit.

§ 402. *¹Subpoenas may require witnesses alone, or to bring books, etc., but not more than thirty miles if out of the county.*

A subpoena may require not only the attendance of the person to whom it is directed, at a particular time and place, to testify as a witness, but may also require him to bring any books, documents or other things under his control, to be used as evidence. No person shall be required to attend as a witness before any Court, Judge, Justice or any other officer out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial.

¹Amended 1855, 197.

§ 403. *¹Subpoena shall be issued, in what cases.*

The subpoena shall be issued as follows :

First—To require attendance before a Court, or at the trial of an issue therein, it shall be issued under the seal of the

* NOTE.—This chapter is applicable to Justices' Courts ; post, § 620.

Court before which the attendance is required, or in which the issue is pending.

Second—To require attendance out of the Court before a Judge, Justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this State, it shall be issued by the Judge, Justice, or any other officer before whom the attendance is required.

Third—To require attendance before a Commissioner appointed to take testimony by a Court of a foreign country, or of the United States, or of any other State in the United States, or of any other district or county within this State, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any Judge or Justice of the Peace in places within their respective jurisdiction, with like power to enforce attendance, and, upon certificate of contumacy to said Court to punish contempt of their process as such Judge or Justice could exercise if the subpoena directed the attendance of the witness before their Courts in a matter pending therein.

¹Amended 1859, 218; 1866, 708. Bancroft's Forms, 603, 611, and 612. Abb. Forms, 1585-1594.

§ 404. *Service of subpoena.*

The service of a subpoena shall be made by showing the original, and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. Such service may be made by any person.

§ 405. *Service on concealed witness.*

If a witness be concealed in a building or vessel, so as to prevent the service of a subpoena upon him, any Court or Judge, or any officer issuing the subpoena, may, upon proof by affidavit of the concealment and of the materiality of the witness, make an order that the Sheriff of the county serve the subpoena; and the Sheriff shall serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.

§ 406. *Persons present may be required to testify without subpoena.*

A person present in Court, or before a judicial officer, may be required to testify, in the same manner as if he were in attendance upon a subpoena issued by such Court or officer.

§ 407. *A witness duly served shall attend as required.*

It shall be the duty of a witness, duly served with a subpoena, to attend at the time appointed, with any papers under his control required by the subpoena, to answer all pertinent and legal questions; and unless sooner discharged, to remain till the testimony is closed.

1. Courts are apt to take too narrow a view of the rights of cross-examination, confining it to the subject matter of the examination-in-chief. Undoubtedly the cross-examination cannot go beyond that matter, but it ought to be allowed a very free range within it. The witness may be sifted as to every fact touching the matters as to which he testifies, so that his temper, leanings, relations to the parties and cause, his intelligence, the accuracy of his memory, his disposition to tell the truth, his character, his means of knowledge, his general and particular acquaintance with the subject matter, may be fully tested. *Jackson v. Feather River and Gibsonville Water Co.*, 14 Cal. 18.

§ 408. *Witness shall answer pertinent questions.*

A witness shall answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need [he] give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact at issue would be presumed. But a witness shall answer as to the fact of his previous conviction for felony.

1. Where the answer of a witness would subject him to criminal punishment, he is not privileged from answering on the ground that his answer would disgrace him, but solely on the ground that he is not compelled to incriminate himself. *Ex parte Rowe*, 7 Cal. 184.

2. Being sentenced on a conviction for petit larceny does not disqualify as a witness. *People v. Shay*, 10 Abb. Pr. R. 413.

§ 409. *Penalty for disobedience to subpoena, etc.*

Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the Court, or officer issuing the subpoena, or requiring the witness to be

sworn ; and if the witness be a party, his complaint may be dismissed, or his answer stricken out.

§ 410. *Witness disobeying subpoena shall forfeit one hundred dollars and all damages.*

A witness disobeying a subpoena shall also forfeit to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend ; which forfeiture and damages may be recovered in a civil action.

§ 411. *If a witness fail to attend, the Court may issue a warrant.*

In case of failure of a witness to attend, the Court or officer issuing the subpoena, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the Sheriff of the county to arrest the witness and bring him before the Court or officer where his attendance was required.

Bancroft's Forms, 272.

§ 412. *If a witness be a prisoner, an order for his examination or production may be made.*

If the witness be a prisoner, confined in a jail or prison within this State, for any other cause than a sentence for felony, an order for his examination in the prison upon deposition, or for his temporary removal and production before a Court or officer for the purpose of being orally examined, may be made as follows :

1st. By the Court itself, in which the action or special proceeding is pending ;

2d. By a Judge of the Supreme Court, District Court, or County Judge of the county where the action or proceeding is pending, if before a Judge or other person out of Court.

§ 413. *Such order can be made only upon affidavit.*

Such order can only be made upon affidavit, showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

§ 414. *When imprisoned witness may be produced or his deposition taken.*

If the witness be imprisoned in the county where the action or proceeding is pending, and for a cause other than a sentence for felony, his production may be required. In all other cases, his examination, when allowed, shall be taken upon deposition.

§ 415. *Witness duly subpoenaed exempt from arrest in a civil action.*

Every person who has been in good faith served with a subpoena to attend as a witness before a Court, Judge, Commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, shall be exonerated from arrest, in a civil action, while going to the place of attendance, necessarily remaining there, and returning therefrom.

1. This section does not exempt him from obeying any ordinary process of the Court, *e. g.*, to attend and answer concerning his property, under a supplementary writ. *Page v. Randall*, 6 Cal. 32.

§ 416. *Arrest of witness under subpoena void, may be discharged on affidavit.*

The arrest of a witness contrary to the last section shall be void ; but an officer shall not be liable to the party for making the arrest in ignorance of the facts creating the exonerated, but shall be liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit, stating :

1st. That he has been served with a subpoena to attend as a witness before a Court, officer, or other person ; specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued ; and,

2d. That he has not been thus served by his own procurement with the intention of avoiding an arrest.

3d. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpoena. The affidavit may be taken by the officer, and shall exonerate him from liability for discharging the witness when arrested.

TITLE XLI.

CHAPTER III.—*Of the examination of parties to an action or proceeding, and of persons for whose immediate benefit such action or proceeding is prosecuted or defended.**

- SECTION 417. No action for discovery of evidence shall be allowed.
418. A party may be examined for the adverse party in the same manner as any other witness.
419. Such examination may be rebutted.
420. Penalty for refusal of a party to testify.
421. Party so called may be examined on his own behalf. When adverse party may be called in rebuttal.
422. A person for whose benefit an action is prosecuted may testify as if a party. And a party may be examined on his own behalf on notice.
423. Copartners, when parties, may be examined to prove items of account.

§ 417. ¹*No action for discovery of evidence shall be allowed.*

No action to obtain a discovery under oath, in aid of the prosecution or defense of another action or proceeding, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner provided by this and the foregoing chapter.

¹ Amended 1863, 7Q1.

1. A judgment was had in the District Court in favor of the appellant, and against the respondent. *Held*, that after judgment against him, it is too late for plaintiff to file his bill for discovery in aid of his defense, on the ground that it was meritorious, and lies entirely within the knowledge of the judgment creditor. *Norris v. Denton*, 2 Cal. 378.

2. The general rule at common law is that parties to the record are not competent to testify; and prior to the statute the only mode of purging the conscience was by proceeding in equity to obtain a discovery. The statute provides that no action for a discovery in aid of the prosecution or defense of another action shall be allowed, and the provision that "a party may be examined as a witness at the instance of the adverse party" was intended as a substitute. *Easterly v. Bassignano*, 20 Cal. 496.

3. The only object to be gained by a plaintiff in anticipating a defense and replying to it in advance, is to put the adverse party upon his oath without making him a witness; and the effect of allowing this would be to establish a system of discovery in conflict with the spirit of the statute. *Campfield v. Tobias*, 21 Cal. 349.

4. Where the pleader attempts to introduce the peculiar formal allegations, many of which were mere fictions, found in the old forms of declaration in common law, actions or bill in equity, his pleading is liable to the objection of irrelevancy, and the objectionable matter should be stricken out on motion. In this case the pleader has attempted to obtain a discovery under oath by means of his pleading. This is forbidden by the four hundred and seventeenth sec-

* This chapter applicable to Justices' Courts, post, § 620.

tion of the Practice Act, and the sections following it provide how such discovery can be obtained, that is, by examining the party as a witness. *Bowen v. Aubrey*, 22 Cal. 570.

Section 418.—Repealed April 27th, 1863, p. 701.

§ 419. *Such examination may be rebutted.*

The examination of a party, thus taken, may be rebutted by adverse testimony.

N. Y. Code, § 393.

§ 420. *¹Penalty for refusal of a party to testify.*

If an adverse party refuse to attend and testify at the trial, or to give his deposition before trial, or upon a commission, when required, his complaint or answer may be stricken out, and judgment be taken against him; and he may be also, in the discretion of the Court, proceeded against as in other cases for a contempt.

¹Amended 1863, 701.

Section 421.—Repealed April 27th, 1863, p. 701.

Section 422.—Repealed April 27th, 1863, p. 702.

Amended 1861, 522.

Section 423.—Repealed April 27th, 1863, p. 702.

Amended 1834, 95.

TITLE XLII.

CHAPTER IV.—*On affidavits.**

SECTION 424. Affidavits to be used in this State, before whom may be taken in this State.

425. If made in another State of the United States, before whom taken.

426. If made in a foreign country, before whom taken.

427. Certificate of clerk, if taken before a Judge of a Court out of this State.

§ 424. *Affidavits to be used in this State, before whom may be taken in this State.*

An affidavit to be used before any Court, Judge, or officer

*This chapter is applicable to Justices' Courts; post, § 620.

of this State, may be taken before any Judge or Clerk of any Court, or any Justice of the Peace, or Notary Public in this State.

1. Where the affidavit of a juror is sworn to be correct by another party, it may be treated as the latter's original affidavit. *Wilson v. Barryman*, 5 Cal. 44.

2. Courts take judicial notice of the official character of Justices of the Peace in their own States. And an affidavit, in which the official character of the Justice before whom it is taken, does not appear, is good. *Ede v. Johnson*, 15 Cal. 53.

§ 425. *If made in another State of the United States, before whom taken.*

An affidavit taken in another State of the United States, to be used in this State, shall be taken before a Commissioner appointed by the Governor of this State to take affidavits and depositions in such other State, or before any Judge of a Court of Record having a seal.

§ 426. *If made in a foreign country, before whom taken.*

An affidavit taken in a foreign country to be used in this State, shall be taken before an Ambassador, Minister, or Consul of the United States, or before any Judge of a Court of Record having a seal in such foreign country.

§ 427. *Certificate of the Clerk, if taken before a Judge of a Court out of this State.*

When an affidavit is taken before a Judge of a Court in another State, or in a foreign country, the genuineness of the signature of the Judge, the existence of the Court, and the fact that such Judge is a member thereof, shall be certified by the Clerk of the Court under the seal thereof.

TITLE XLIII.

CHAPTER V.—*Of depositions taken in this State.**

SECTION 428. Depositions of witnesses in this State may be taken in certain cases.

429. Depositions may be taken before a Judge, etc., upon notice to the adverse party.

430. Manner of taking depositions. May be used by either party on the trial.

431. A deposition may be read at any stage of the action or proceeding.

* This chapter is applicable to Justices' Courts, *post*, § 620.

§ 428. *Depositions of witnesses in this State may be taken in certain cases.*

The testimony of a witness in this State may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein, in the following cases:

1st. When the witness is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended;

2d. When the witness resides out of the county in which his testimony is to be used;

3d. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required;

4th. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend.

1. Taking testimony by depositions is in derogation of the common law, and must not only be done by the proper officer, but every requirement of law must be complied with. *McCann v. Beach*, 2 Cal. 25.

2. All the requisitions of the statute, in relation to the taking of depositions, must be strictly complied with; and this must appear upon the deposition to entitle it to admission. *Dye v. Bailey*, 2 Cal. 383.

3. The testimony of a party to an action may be taken by deposition, if he resides out of the county in which his testimony is to be used, although he resides within less than thirty miles of the place of trial. *Skidmore v. Taylor*, 39 Cal. 619.

§ 429. *Depositions may be taken before a Judge, etc., upon notice to the adverse party.*

Either party may have the deposition taken, of a witness in this State, before any Judge, or Clerk, or any Justice of the Peace, or Notary Public in this State, on serving on the adverse party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is one mentioned in the last section. At any time during the forty days immediately after the service of summons by publication has been completed, and at any time thereafter, when the defendant has not appeared, the notice required by this section may be served on the Clerk of the Court where the action is pending. Such notice shall be at least five days, and, in addition, one day for every twenty-five miles of the

distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a Judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order shall be served with the notice.

¹Amended 1859, 218; Bancroft's Forms, 550-551.

1. A slight error in the title of a cause, where there is no other suit pending between the parties, will not invalidate the notice. *Mills v. Dunlap*, 3 Cal. 94.

2. The decision of such motion rests in the sound discretion of the Court, who must decide upon the sufficiency, or otherwise, of the grounds upon which such motion is made. *Id.*

3. Proof of notice to take a deposition, where the written notice was defective, was held good, when made by parol and conforming substantially to the statute. *Id.*

4. An appearance at the time and place, and cross-examining the witness, waives whatever objection may be had because the notice is too short. *Jones v. Love*, 9 Cal. 68.

5. An order to take testimony by deposition should specify the notice to be given to the adverse party. A deposition taken upon an order without such specification, where the opposite party has not had reasonable notice, ought not to be read in evidence. *Ellis v. Jaszymsky*, 5 Cal. 444.

6. Notice of time and place having been given, it is a matter of small importance who took the deposition, particularly in view of the inconvenience and delay which would result from a different rule. *Williams v. Chadbourne*, 6 Cal. 559.

7. It being objected by plaintiff to a deposition: 1st, that the copy of the order of the Judge, fixing the time for taking it, did not mention the notice to be given the adverse party; 2d, that no correct copy of said order was served; 3d, that no sufficient notice to take the deposition was ever given; the objection was overruled, "because the original order of the Judge, made on affidavit, fixed the time of notice at three days, and because plaintiff's counsel acknowledged service in writing of a copy thereof March 8th, 1859, more than three days before the taking of the deposition." *Held*, that there was no error; that the objection assigned was matter for the Court, and its discretion was properly exercised; that reasonable notice should be given of the time and place of taking testimony: but what is reasonable notice, depends on the particular circumstances. *Attwood v. Fricot*, 17 Cal. 37.

8. To make the testimony of a witness admissible, he must be competent at the time of taking his deposition. It is the effect of the interest on the witness at the time his testimony is taken that disqualifies him. *Kimball v. Gearhart*, 12 Cal. 27.

§ 480. *Manner of taking depositions; may be used by either party on the trial.*

Either party may attend such examination and put such questions, direct and cross, as may be proper. The deposition, when completed, shall be carefully read to the witness and corrected by him in any particular, if desired; it shall then be subscribed by the witness, certified by the Judge or officer taking the deposition, inclosed in an envelope or wrapper sealed, and directed to the Clerk of the Court in which the action is pending, or to such person as the parties in

writing may agree upon, and either delivered by the Judge or officer to the Clerk or such person, or transmitted through the mail, or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial, or other proceeding, against any party giving or receiving the notice, subject to all legal exceptions. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken by the reason of the absence or intended absence from the county of the witness, or because he is too infirm to attend, proof by affidavit or oral testimony shall be made at the trial that the witness continues absent, or infirm, to the best of the deponent's knowledge or belief. The deposition thus taken may also be read in case of the death of the witness.

1. Where a deposition is taken *ex parte*, though after notice, and the witness is therefore not subjected to a cross-examination, the language used by him will be suspiciously regarded, and only a very literal interpretation given to it. *Spring v. Hill*, 6 Cal. 17.

2. There is nothing in the statute that requires that exceptions to depositions shall be filed before the time of trial. The objection can be made at any time before the depositions are read in evidence. *Dye v. Bailey*, 2 Cal. 383.

3. The certificate of the notary, as set forth in the case, is sufficient. *Mills v. Dunlap*, 3 Cal. 94.

4. Depositions are subject to all legal exceptions at the trial, save only the objection to the form of an interrogatory where the parties attend the examination. *Lawrence v. Fulton*, 19 Cal. 683.

5. Where the parties stipulated that a deposition, which had been taken in another action, should be used on the trial, "with the same force and effect, subject to the same exceptions as if taken in this case:" Held, that the stipulation was a waiver of any objections to the competency of the witness. *Brooks v. Crosby*, 22 Cal. 42.

6. If, at the end of a deposition taken by a commissioner out of the State, there is a *jurat* giving the date when the deposition was subscribed and sworn to, it is not necessary that the further certificate of a compliance with the four hundred and thirtieth section of the Practice Act should be dated. *Elgin v. Hill*, 27 Cal. 373.

7. If the parties stipulate that a commissioner may take a deposition upon written interrogatories, and the stipulation says nothing about the day the same may be taken by the commissioner, it is not necessary that the commissioner state in his certificate the day the same was taken. *Id.*

8. A certificate to a deposition must state that the deposition was read to the witness before signing; it must set forth an actual compliance with all the requirements of the statute. The admission of hearsay testimony to a fact admitted by both parties, is not error. *Williams v. Chadbourne*, 6 Cal. 559.

9. A party who appears at the taking of a deposition, and examines the witness without objecting to his competency, cannot afterwards interpose that objection. *Brooks v. Crosby*, 22 Cal. 42.

10. When a deposition may be excluded.—A whole deposition cannot be excluded on the ground that certain questions asked on the examination

were improper. The objection to the deposition on this ground must be confined to the particular questions, otherwise any error in permitting the questions will be waived. *Higgins v. Wortell*, 18 Cal. 330.

11. It is not essential to the certificate of a notary to a deposition taken before him, that it state that the deposition was read over to the witness before signing. But if the certificate states that the deposition was corrected by the notary, under the direction of the witness, it is a sufficient compliance with the statute, because showing, by necessary implication, that the deposition was either read to or examined by the witness. *Id.*

12. If part of the deposition be liable to the exception of hearsay, this goes only to the rejection of that part, and the objection should be taken at the hearing. *Myers v. Casey*, 14 Cal. 542.

13. Where a rule of a District Court requires three days' notice of exceptions to depositions unless the exceptions appear on the face of the deposition, the meaning is that the objection—not the objectionable matter—must appear on the face of the deposition. *Id.*

14. It is no ground for the exclusion of a deposition that it was noticed to be taken before the County Judge, but was taken before the county clerk. *Williams v. Chadbourne*, 6 Cal. 559.

15. A motion to suppress the reading of a deposition, before the case in which it was taken is put upon trial, is premature; the proper time to object to such deposition is when it is offered in evidence on the trial. *Mills v. Duval*, 3 Cal. 94.

§ 431. *A deposition may be used at any stage of the action or proceeding.*

When a deposition has been once taken, it may be read in any stage of the same action or proceeding by either party, and shall then be deemed the evidence of the party reading it.

1. The reading of evidence taken by deposition, although done after the jury have retired, is as much a part of the trial as any other. *The People v. Kohler*, 5 Cal. 72.

2. *Query*: Whether a party can object, on second trial to the reading of a deposition which he suffered his adversary to read on the first trial without objection. *Myers v. Casey*, 14 Cal. 542.

3. The object of this section is to enable either party to read a deposition admissible in itself, once taken, in any stage of the action or proceeding—not to render it admissible simply because it was taken. *Turner v. McIlhenny*, 8 Cal. 575.

TITLE XLIV.

CHAPTER VI.—Of depositions taken out of this State.*

SECTION 432. Testimony of a witness out of the State may be taken after service of summons or issue joined.

433. Such deposition shall be taken upon commission issued under seal, upon notice; to whom to issue.

434. Proper interrogatories, direct and cross, may be prepared or may be waived by the parties.

435. Authority and duties of commissioner.

436. Trial shall not be postponed for return of commission, except upon showing of materiality of evidence and due diligence.

* This chapter is applicable to Justices' Courts, post, § 626.

§ 432. *Testimony of a witness out of the State may be taken after service of summons or issue joined.*

The testimony of a witness out of the State may be taken by deposition, in an action, at any time after the service of the summons, or the appearance of the defendant; and in a special proceeding, at any time after a question of fact has arisen therein.

1. Diligence must be used in applying for a commission. *Pierson v. Holbrook*, 2 Cal. 598. *Vide* Rule 46.

§ 433. *Such deposition shall be taken upon commission issued under seal upon notice; to whom to issue.*

The deposition of a witness out of this State shall be taken upon commission issued from the Court, under the seal of the Court, upon an order of the Judge, or Court, or County Judge, on the application of either party, upon five days' previous notice to the other. It shall be issued to a person agreed upon between the parties, or if they do not agree, to any Judge or Justice of the Peace selected by the officer granting the commission, or to a commissioner appointed by the Governor of this State to take affidavits and depositions in other States.*

Bancroft's Forms, 545-6.

*STATUTES OF 1858, 22.

The first section of an act entitled "An act empowering the Governor to appoint commissioners of deeds, and defining the duties of such officers," passed March 20th, 1850, is hereby amended so as to read as follows: "The Governor may, when, in his judgment, it may be necessary, appoint in each of the United States, and in each of the territories and districts of the United States, and in each foreign state, territory, and colony, one or more commissioners, to continue in office four years, unless removed by the Governor. Every such commissioner shall have power to administer oaths and to take depositions and affidavits to be used in this state; and also to take the acknowledgment or proof of any deed or other instrument to be recorded in this State."

STATUTES OF 1861, 553.

CHAPTER CCCCXIV.—Act to authorize the taking of depositions in foreign countries.

SECTION 1. The testimony of a witness in a foreign country may be taken by deposition in any civil action pending in any of the District Courts of this State, at any time after the service of the summons, or the appearance of the defendant; and in a special proceeding, at any time after a question of fact has arisen therein.

SEC. 2. The deposition of a witness in a foreign country shall be taken upon commission issued from a District Court, under the seal thereof, upon an order of such Court, or the Judge thereof, on the application of either party, upon five days previous notice to the other. It shall be issued to a person or persons agreed upon between the parties, or if they do not agree, to any person or persons nominated by the Court or Judge granting the commission.

SEC. 3. Such proper interrogatories, direct and cross, as the respective parties may prepare, to be settled, if the parties disagree as to their form, by the Court or Judge granting the order for the commission at a day fixed in the order, may be annexed to the commission; or when the parties agree to that mode, the examination may be without written interrogatories.

SEC. 4. The commission shall authorize the commissioner to administer an oath to the witness and to take his deposition in answer to the interrogatories; or when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the

§ 434. *Proper interrogatories may be prepared, or may be waived, by the parties.*

Such proper interrogatories, direct and cross, as the respective parties may prepare, to be settled, if the parties disagree as to their form, by the Judge or officer granting the order for the commission, at a day fixed in the order, may be annexed to the commission; or when the parties agree to that mode, the examination may be without written interrogatories.

1. If a commission to take the deposition of a witness out of the State is issued, on the application of one party without consent of the other, to a person who is not a Judge or Justice of the Peace, or a commissioner appointed by the Governor of this State, and the party who does not consent, after the appointment, files cross interrogatories, and stipulates as to the manner in which the deposition shall be returned, is estopped from saying that the commissioner was improperly appointed. *Crowther v. Rowlandson*, 27 Cal. 383.

§ 435. *Authority and duties of commissioner.*

The commission shall authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to the interrogatories; or when the examination is to be without interrogatories, in respect to the question in dispute; and to certify the deposition to the Court, in a sealed envelop directed to the Clerk, or other person designated or agreed upon, and forwarded to him by mail or other usual channel of conveyance.

Bancroft's Forms, 547-8.

1. If the parties stipulate that a commissioner may take a deposition upon written interrogatories, and the stipulation says nothing about the day the same may be taken by the commissioner, it is not necessary that the commissioner state in his certificate the day the same was taken. *Elgin v. Hill*, 27 Cal. 373.

§ 436. *Trial shall not be postponed for return of commission, except upon showing of materiality of evidence and due diligence.*

A trial, or other proceeding, shall not be postponed by reason of a commission not returned, except upon evidence satisfactory to the Court that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

deposition to the Court in a sealed or closed envelop, directed to the clerk or other person designated or agreed upon, and forward to him by mail or other usual channel of conveyance.

SEC. 5. When a deposition has been once taken in accordance with the provisions of this act, it may be subject to legal objections, be read in evidence in any a age of the same action or proceeding, by either party, and shall then be deemed the evidence of the party reading it.

SEC. 6. This act shall take effect from and after its passage.

1. Where a party applied for a continuance to enable him to take the deposition of an absent witness, and the proof which was designed to be obtained would constitute no defense to the plaintiff's claim, the application was properly rejected. *Hawley v. Stirling*, 2 Cal. 470.

2. The answer of defendant was filed May 10th, 1852, and the application for a continuance to take testimony in New York was filed June 14th, 1852, during which interval no attempt was made to sue out a commission for the purpose. *Held*, that this is not sufficient diligence to entitle the party to his application. *Pierson v. Holbrook*, 2 Cal. 598. See § 432.

TITLE XLV.

CHAPTER VII.—*Of proceedings to perpetuate testimony.**

SECTION 437. Testimony may be perpetuated.

438. The applicant shall present verified petition to a Judge.
Granting and service of order.

439. Upon due service of notice, the depositions of the witnesses named may be taken.

440. Manner of taking depositions and filing thereof.

441. Affidavits, etc., filed with depositions shall be *prima facie* proof of the facts therein stated.

442. Manner of using such depositions, if trial be had.

§ 437. *'Testimony may be perpetuated.*

The testimony of a witness, or witnesses, may be taken and perpetuated as provided in this chapter.

Amended 1859, 219.

§ 438. *'The applicant shall present verified petition. Granting and service of order.*

The applicant shall present to a District or County Judge a petition, verified by the oath of the applicant, stating:

1st. That the applicant expects to be a party to an action in a Court in this State, and in such case, the name or names of the person, or persons, whom he expects will be adverse parties; or,

2d. That the proof of some fact, or facts, is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

*This chapter is applicable to Justices' courts; post, § 620.

3d. The name or names of the witness, or witnesses, to be examined, his or their place of residence, and a general outline of the facts expected to be proved. The Judge, to whom such petition is presented, shall make an order allowing the examination, and prescribing the notice to be given, which notice, if parties are known and reside in this State, shall be personally served on them ; and if unknown, such notice shall be served on the Clerk of the county where the property to be affected by such evidence is situated, and a notice thereof published in some newspaper to be designated by the Judge making the order.

¹Amended 1859, 219. Abb. Forms, 1581-4.

§ 439. ¹*Upon due service of notice, the depositions of the witnesses named may be taken.*

Upon proof of service of the notice, as provided in the last section, it shall be the duty of the Judge, before whom the depositions are ordered to be taken, to proceed to take the depositions of the witnesses named in said petition, upon the facts therein set forth, and the taking of the same may be continued, from time to time, in the discretion of the Judge.

¹Amended 1859, 219.

§ 440. ¹*Manner of taking depositions and filing thereof.*

The examination shall be by question and answer, unless the parties otherwise agree. The deposition, when taken, shall be carefully read to, and subscribed by, the witness, then certified by the Judge, and immediately thereafter, filed in the office of the Clerk of the District Court of the county where the same was taken, together with the order for the examination, the petition on which the same was granted, and the proof of service of notice.

¹Amended 1859, 219.

§ 441. ¹*Affidavits, etc., filed with depositions, shall be prima facie proof of the facts therein stated.*

The affidavits, or other proof filed with the depositions, or certified copies thereof, shall be *prima facie* evidence of the facts therein stated.

¹Amended 1859, 219.

§ 442. ¹*Manner of using such depositions, if trial be had.*

If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove, or tend to prove, upon proof of the death or insanity of the witness or witnesses, or of his or their inability to attend the trial by reason of age, sickness, or settled infirmity, the deposition or depositions, or certified copies thereof, may be used by either party, subject to all legal objections. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the examination.

¹Amended 1859, 219.

TITLE XLVI.

CHAPTER VIII.—*Administration of oaths and affirmations.**

SECTION 443. Authorizing certain persons to administer oaths.

444. A person may be sworn according to the peculiar ceremonies of his religion.

445. A witness may, instead of taking an oath, make an affirmation.

§ 443. *Authorizing certain persons to administer oaths.*

Every Court of this State, every Judge or Clerk of any Court, every Justice of the Peace, and every Notary Public, and every officer authorized to take testimony, or to decide upon evidence in any proceeding, shall have power to administer oaths or affirmations.

1. The attestation or certificate of a notary, that an affidavit was sworn to or affirmed and subscribed before him, is regular, although his seal is not affixed. *Mills v. Dunlap*, 3 Cal. 97.

§ 444. *A person may be sworn according to the peculiar ceremonies if his religion.*

When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such.

* This chapter is applicable to Justices' Courts; post, § 620.

§ 445. *A witness may, instead of taking an oath, make an affirmation.*

Any witness who desires it may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting, when addressed in the following form: "You do solemnly affirm, that the evidence you shall give in this issue (or matter), pending between ——— and ———, shall be the truth, the whole truth, and nothing but the truth." Assent to this affirmation shall be made by the answer, "I do." A false affirmation or declaration shall be deemed perjury, equally with a false oath.

TITLE XLVII.

CHAPTER IX.—*Inspection of documents, and miscellaneous provisions as to records and writings.*

- SECTION 446. The Court may, upon notice, order a party to grant an inspection of a book, etc., relating to the merits of a case.
447. When there may be evidence of the contents of a writing other than itself.
448. Introduction in evidence of a writing altered in a material part.
449. Proof of a judicial record of this State, or of the United States.
450. Proof of the records, etc., of any other State of the United States.
451. Proof of a judicial record of a foreign country.
452. Proof of a copy of a judicial record of a foreign country.
453. Printed copies of statutes, etc., of another State or Government, published by authority, are presumptive evidence of such laws.
454. Impression of a seal of a Court or public office.

§ 446. *The Court may, upon notice, order a party to grant an inspection of a book, etc., relating to the merits of a case.*

*STATUTES OF 1852, 106.

An Act concerning the administration of oaths. Passed May 1st, 1852.

SECTION 1. That all officers of this State, authorised by law to administer oaths or affirmations, may certify the same under their hands, without affixing to such certificates their seals of office.

SEC. 2. That all oaths or affirmations heretofore administered by any officer of this State, and by him certified, under his hand, without the seal of office, shall be as effectual for all purposes, as if such seal had been affixed to such certificate.

Any Court in which an action is pending, or a Judge thereof, or a County Judge, may, upon notice, order either party to give to the other within a specified time an inspection and copy, or permission to take a copy of any book, document, or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the Court may exclude the book, document, or paper, from being given in evidence; or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the Court may also punish the party refusing for a contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers, or documents, when he is examined as a witness.

N. Y. Code, § 388. Notice, sufficiency of; see § 447.

1. The Practice Act authorizes the Court to make an order directing a party to produce books and papers in Court. *Burnstead v. Empire Mining Co.*, 5 Cal. 299.

§ 447. *When there may be evidence of the contents of a writing other than itself.*

There shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1st. When the original has been lost or destroyed; in which case proof of the loss or destruction shall first be made;

2d. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice;

3d. When the original is a record or other document, in the custody of a public officer;

4th. When the original has been recorded, and a certified copy of the record is made evidence by statute;

5th. When the original consists of numerous accounts or other documents, which cannot be examined in Court without great loss of time, and the evidence sought from them is only the general result of the whole.

1. First subdivision.—In suit by the assignee of a book account, the assignor is a competent witness to prove to the Court the loss of the book of original entries, as a preliminary to the introduction of secondary evidence of its contents. *Caulfield v. Sanders*, 17 Cal. 569.

2. The facts and circumstances of the destruction must be shown, in the

first instance, to the Court, to enable it to judge of the propriety of admitting or refusing the secondary evidence. The same principle which allows the parties to prove by their own testimony the destruction, must necessarily allow them to prove all such facts and circumstances as are requisite to the introduction of the secondary evidence. *Bagley v. Administrator of McMickle, Eaton et al.*, 9 Cal. 430.

3. It is not a matter of course to allow secondary evidence of the contents of an instrument in suit upon proof of its destruction. If the destruction was the result of accident, or was without the agency or consent of the owner, such evidence is generally admissible. But, if the destruction was voluntarily and deliberately made by the owner, or with his assent, the admissibility of the evidence will depend upon the cause or motive of the party, in effecting or assenting to the destruction. *Id.*

4. As to parol evidence to prove contents of instruments destroyed by fire. *Collier v. Corbett*, 15 Cal. 183.

5. A copy of a notice posted on a mining claim to show its extent is not admissible in evidence, if the notice itself be attainable. Such evidence is secondary, and is admissible only upon the terms which control its introduction in other cases. *Lombardo v. Ferguson*, 15 Cal. 372.

6. Where the record book containing a judgment has been destroyed by fire, secondary evidence is admissible to establish the fact of the existence of such judgment and its contents. *Ames v. Hoy*, 12 Cal. 11.

7. Proof that a notice upon a mining claim has been torn, and that the remaining portion is (as the witness thinks) illegible and defaced, is enough to introduce a copy of it. *Dunning et al. v. Rankin*, 19 Cal. 640.

8. E. Lawrence testified that he once had a deed in his possession, and at first thought that F. had it now, but that he had received a letter from F. saying that the witness had not returned said deed to him; now he was satisfied it was not in F.'s possession. The plaintiff also made oath he had never had the deed. *Held*, to be insufficient to introduce parol proof of its contents. *Lawrence v. Fulton*, 19 Cal. 683.

9. The proof of the loss of receipts, without proof of their genuineness, is not a sufficient predicate for the admission of evidence as to their contents. *Reynolds v. Jourdan*, 6 Cal. 108.

10. **Party may testify to loss of instrument.**—Whatever may have been the reason originally assigned, the true ground upon which the testimony of parties is admitted to prove the destruction of written instruments, is this: that the testimony relates to matters preliminary and incidental, is addressed solely to the Court, and does not affect the issue to be tried by the jury. Upon such matters, the rule as to the incompetency of parties and interested persons does not apply. The testimony proves nothing in the cause; it only prepares the way for the introduction of proof. The existence and contents of the instruments must be established by distinct and competent evidence. *Bagley v. Eaton*, 10 Cal. 126; *Landis v. Turner*, 14 Cal. 575.

11. The rule is well settled that a party has a right to testify on his own behalf to prove the loss of original documents, as a predicate for the introduction of secondary evidence to prove their contents. *Grass Valley Quartz Mining Co. v. Stackhouse et al.*, 6 Cal. 413.

12. Proof of the loss of the instrument may be by the party's own affidavit to lay a foundation for proving the contents. But the affidavit of a third person, that a trunk of the party containing his papers is lost, is insufficient, without showing that it contained the paper in question. But this the party may show by his own oath. Taking testimony by depositions is in derogation of the common law, and must not only be done before the proper officer, but every requirement of law must be complied with. Depositions may be taken by notaries public, but only when the witness resides out of the county where the suit is pending, and a commission is regularly sued out and directed to the notary. *McCann v. Beach*, 2 Cal. 25.

13. In this State, the testimony may be given orally or offered by affidavit. The convenience of the parties and of the Court will sometimes suggest one course and sometimes another. Either course may be adopted, and either course will avail. *Bagley v. Eaton*, 10 Cal. 126.

14. **Diligence necessary.**—Evidence that the library and papers of the party were destroyed by fire, except a few papers, unaccompanied by evidence of search for the particular paper, is insufficient, for the paper in question may be one of those saved from the fire. *Folsom's Executors v. Scott*, 6 Cal. 460.

15. Mere evidence of search is not sufficient, for the search may not have been diligent. *Id.*

16. In an action of ejectment, where the plaintiff seeks to establish the loss of a deed under which he derails title, in order to lay the foundation for secondary evidence, the proof of search by the agent or attorney in fact of the plaintiff, and inquiry by him of the grantor, is insufficient, as the plaintiff himself might have the possession or control of the original, and, in the absence of other evidence, his affidavit should have been offered. *Fallon v. Dougherty*, 12 Cal. 104.

17. It is sufficient, *prima facie*, to show that the grantee, or his representative or assignee, did not have the grant, and that it was not in the place where it was last seen. *Pierce v. Wallace*, 18 Cal. 165.

18. **Second subdivision.**—Parol evidence of the contents of a written contract between the alleged husband and wife to live together without marriage is inadmissible, except after due notice to produce the contract, and refusal to do so. *Poole & Wife v. Gerrard*, 9 Cal. 593.

19. Parol proof of a written contract and assignment thereof in writing, not admissible, so as to charge the assignee, without notice to produce the original or accounting for its loss. *Grimes v. Full*, 15 Cal. 63.

20. Where it is impossible to produce the paper between the time of giving the notice and the trial, that fact should be made to appear. *Burke et al. v. Table Mountain Co.*, 12 Cal. 403.

21. **Form and sufficiency of notice.**—On the day of trial, plaintiffs served upon the defendants notice to produce on trial "the written agreement, cancelling the lease alleged to have been made between A. B. Laforge and the Table Mountain Water Company—said agreement having been made by A. B. Laforge and the Table Mountain Water Company—or parol evidence will be given of its contents." The defendants not producing the agreement, parol evidence was admitted on trial of its contents. The notice was held sufficient. *Burke v. Table Mountain Water Co. and Laforge*, 12 Cal. 403.

22. In this case it was shown that the paper was on the day of trial in the possession of one of the attorneys of the defendant. *Id.*

23. The sufficiency of notice to produce a paper shown to be in the possession of a party is a question of discretion; and if it were impossible to procure it between the time of giving notice and the trial, that fact should be made to appear. *Id.*

24. Literal accuracy cannot be expected in the description of a paper in the possession of the adverse party; such description as will apprise a man of ordinary intelligence of the document denied is enough. *Id.*

25. **Third subdivision.**—Certified copies of grants made by the Surveyor-General of the United States are inadmissible in evidence unless the absence of the original is accounted for. *Hensley v. Turpey*, 7 Cal. 288.

26. An affidavit, showing that the Surveyor-General has adopted a rule refusing to allow the originals to be taken from the files, is a sufficient predicate. *Id.*

27. Where, to suit for goods sold and delivered, defendant pleads his discharge in insolvency: *Held*, that in support of his plea he can offer in evidence certified copies of the decree, and of each of the papers composing the record of the insolvent proceeding *separately*; and that these papers need not all be attached together, and the whole certified as one record. *Gladstone v. Davidson*, 18 Cal. 41.

28. A certificate of the Surveyor-General, that the paper "is a true and accurate copy of a document" on file in his office, is sufficient against the objection that the copy is not duly authenticated, it being conceded that such document was the original grant. *Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 544.

29. A duly certified copy of a Mexican grant, from the United States Surveyor-General's office, is admissible in evidence against the objection that the absence

of the original is not accounted for. But it is admissible only when the original itself would be. The statute (Acts of 1857, p. 317) simply removes the objection to the copy as secondary evidence. *Id.*

30. The *expediente*, consisting of the petition, plot, reference, report, act of concession, approval, grant, etc., filed in the archives of the Mexican Government, is as much an original document as the grant delivered to the grantee. *Baldwin, J. Gregory v. McPherson*, 13 Cal. 562.

31. **Fourth subdivision.**—A recorder, in certifying to copies of deeds from his office, need not transcribe the notarial seal to the acknowledgment—the certificate of acknowledgment in this case stating that the notary did affix his seal. *Jones v. Martin*, 16 Cal. 165.

32. A power of attorney, not affecting real estate, is not required to be recorded, and the fact of such instrument being acknowledged and recorded does not authorize it to be read in evidence without proof of its execution. *Stevens v. Irwin*, 12 Cal. 306.

33. Where an original instrument, proved to be lost, has been recorded, it is error to admit parol evidence of its contents, unless the failure to produce the record is accounted for. *Brotherton v. Mart*, 6 Cal. 488.

34. To make the copy of an unrecorded deed evidence, the loss of the original being shown, the testimony of the subscribing witnesses to the deed, if such there be, should be had, at least to the fact of the execution of the paper, unless they are shown to be without the jurisdiction of the Court. *Smith v. Brannan*, 13 Cal. 107.

35. The Act of 1851, section twenty-first, gives to papers properly recorded the like effect as originals, but it does not dispense with proof of execution. *Powell's Heirs v. Hendricks*, 3 Cal. 427.

36. Section twenty-first of the Act of March, 1851, giving to copies of papers from the County Recorder's office the like effect as evidence as originals, does not dispense with the production of the originals if they can be obtained; it merely fixes the value of the copy as evidence, when it is necessary to be introduced, from the loss of the original. *Macy v. Goodwin*, 6 Cal. 579.

37. Copies of deeds duly filed for record in the recorder's office of the proper county, or which, after having been duly filed for record, have been recorded in the proper book of records, are admissible in evidence in all Courts and in all actions and proceedings with the like effect as the originals could be if produced upon proof of the loss of the originals, or that they are not in the power of the parties offering the copies. *McMinn v. O'Connor*, 27 Cal. 238.

38. **Where papers are not in the control of party offering copies in evidence.**—An affidavit by a party to the suit that the original deed is not in his possession or under his control, is sufficient to admit in evidence a certified copy from the recorder's office, the deed having been properly acknowledged and recorded, and the grantee being a third person. *Skinker v. Flohr*, 13 Cal. 638.

39. A party claiming title under a deed duly acknowledged is entitled to have a certified copy of the record of the same received in evidence upon making statute proof that he never had control of the original, and that it is not in his power or control. *Hurlburt v. Butenop*, 27 Cal. 50.

40. The act of 1857, concerning copies of certain instruments in writing, provides that duly certified copies of such deeds shall be received in evidence, provided, it be shown that the said originals are not under the control of the party offering the said copies, or are lost. *Hicks v. Coleman et al.*, 25 Cal. 123.

§ 448. *Introduction in evidence of a writing altered in a material part.*

The party producing a writing as genuine, which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, and such alteration is not noted on the writing, shall account for the appear-

ance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made. If he do that, he may give the writing in evidence, but not otherwise.

1. A party offering a promissory note in evidence is not obliged, before the same is admitted, to account for an erasure appearing upon the face of it, unless the erasure has been made or appears to have been made after the execution of the instrument, and is on a part of the note which is material to the point in dispute. *Corcoran v. Doll*, 32 Cal. 82.

2. When a printed form of a promissory note is used, and an erasure is made only as to the printed matter, the presumption is that it was prior to the execution of the note, and to suit the terms agreed on by the parties. *Id.*

3. Where a deed is produced in evidence by a party claiming under it, and it appears upon its face to have been altered in a particular material to his interest and to the prejudice of the other party, it is incumbent on him to establish by satisfactory evidence that the alteration was made by the grantor or by his authority, or the deed will be deemed for the purposes of the action to read as it did before the alteration was made. *Galland et al. v. Jackman*, 26 Cal. 79.

§ 449. *Proof of a judicial record of this State or of the United States.*

A judicial record of this State, or of the United States, may be proved by the production of the original, or a copy thereof, certified by the Clerk, or other person having the legal custody thereof, under the seal of the Court, to be a true copy of such record.*

See § 655.

1. There is no attempt by this section to dispense with the rule that the best evidence must be resorted to which the nature of the case will admit. *Macy v. Goodwin*, 6 Cal. 579.

*STATUTES OF 1857, 103.

An act concerning evidence. Passed March 26th, 1853.

1. Whenever the public records, books or papers, in the "custody" of any collector of customs of the United States, or of the register or receiver of any land office of the United States in this state, or in the office of the surveyor general of the United States for the State of California, or in the office and in the custody of the clerk of the Circuit or any District Court of the United States for the state of California, shall be required as evidence in any Court of this state, copies of such records, books or papers, duly certified by the proper officer, under his hand and official seal, where he has a seal, shall be received in evidence with the same force and effect as the originals.

STATUTES OF 1857, 317.

An act concerning certified copies of certain instruments in writing. Passed April 29th, 1857.

1. Copies of all papers lately belonging to the United States board of commissioners for the settlement of private land claims in California, and on file in the office of the surveyor general of the United States for the State of California, and all copies of documents and papers belonging to said surveyor's office, which copies shall have been duly certified to be true copies by said surveyor, shall be received and read in evidence in the same manner and with like effect as the originals.

The provisions of this section sustained. *Natoma Water Co. v. Clarkin*, 14 Cal. 544.

2. Duly certified copies of deeds regularly recorded, upon the acknowledgment or proof of execution by the party or parties thereto, subject, however to all legal exception that might be taken to the original, if produced, shall be received in evidence in all the

2. To entitle a book to the character of an official register, it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable. It is sufficient that it is directed by the proper officer to be kept. *Kyburg v. Perkins*, 6 Cal. 674.

3. In ejectment, plaintiff—relying upon a Mexican grant and a decree of United States board of land commissioners—offered in evidence a copy of the decree, taken from the office of the United States surveyor general, with a certificate by the surveyor general that “the foregoing is a correct copy of the decree of confirmation made by said board of commissioners in the case therein mentioned, together with the indorsements thereon, as the same is on file in my office,” defendant objecting that the copy was not properly certified. *Held*, that the certificate complies sufficiently with the statute, the terms of which need not be literally pursued. *Young v. Emerson*, 18 Cal. 416.

4. The book of accounts kept in the office of an alcalde is admissible in evidence, as the register of the acts of that officer, belonging to the office. *Kyburg v. Perkins*, 6 Cal. 674.

5. The record of a judgment of another State, if certified in conformity with the Act of Congress, is admissible in evidence in this State. *Parke v. Williams*, 7 Cal. 247.

6. The fact that such official record of alcaldes' grants was not kept by American alcaldes strictly in accordance with the regulations of the King of Spain, made in 1789, called the Plan of Pitio, does not make them secondary evidence, for it is either primary evidence, or of no value whatever as evidence. *Donner v. Palmer et als.*, 31 Cal. 500.

7. Whenever Book A of original alcalde's grants, made by American alcaldes in San Francisco, contains a full copy of the paper delivered to the grantee, with the genuine signature of the alcalde appended thereto, it was kept substantially according to the regulations of the king of Spain, and is an official record and primary evidence. *Id.*

8. Whenever said Book A does not contain a full copy of the paper delivered to grantee, but a summary of the proceedings sufficient to show an application for a grant, and that a grant was made over the genuine signature of the alcalde, the entries were also an official record and primary evidence of the grant to which they refer. *Id.*

9. Alcaldes' grants of lots in pueblos in California, made while the Spanish or Mexican laws were in force, were required to be entered in a book to be kept by the alcaldes for that purpose, and then to be signed and attested by the proper officer. A copy or summary statements of the proceedings, as contained in this book, also signed and attested by the proper officer, was then to be given to the grantee as evidence of his title. *Id.*

Courts of this state, without any further or other proof of the execution thereof, in the same manner and with like effect as if the originals were produced and proven, provided it be shown that the said originals are not under the control of the party offering the said copies, or are lost.

The provisions of this section sustained. *Skinker v. Fiehr*, 18 Cal. 638.

3. Any person wishing, in order to obtain the benefit of this Act, to establish the genuineness of any patent for land issued by the United States, or by this State, may apply for that purpose to the District Court of the judicial district in which the patented lands, or any part thereof, are situated, after giving public notice of the time of his making said application, at least five days previous to the hearing thereof, either by one insertion in a newspaper, where there is one published in the county wherein the lands or parcels of land in said district may be situated, or in default thereof, by posting said notice on the Court house door of said county; provided, that notice shall not be required to be given in more than one county; upon proof being made that the said notice was duly given, the District Court shall proceed to inspect the patent, and upon being satisfied that it is genuine, may endorse thereupon or annex thereto an order under the seal of the Court, declaring said patent to be genuine; and if the Court be not satisfied that the said patent is genuine, then no other [order] shall be entered or made relative thereto.

4. It shall be the duty of the county recorder of each county in this State to provide a separate book, to be called “The Record of Patents,” wherein shall be recorded all patents of land or parcels of land situate in their county, whether issued by the United States or the State of California, which may be offered for record, authenticated as in the foregoing section mentioned; and a duly certified copy of any patent, recorded as aforesaid, may be offered in evidence in any proceeding or action in this State, with the same effect and force as the original duly exhibited and proven.

10. The record of such grants so kept in this book, became an official record of the same and primary evidence of facts recited therein. Such record is not secondary evidence, subordinate to the certified copy of the same to be given to the grantee, and if any distinction as evidence exists between the record in this book and the certified copy, the higher decree or rank must be accorded to the record in the book. *Id.*

11. To entitle such record of a grant to be received in evidence is not necessary to produce or prove the loss of the certified copy of the same given to the grantee. *Id.*

§ 450. *Proof of the records, etc., of any other State of the United States.*

The records and judicial proceedings of the Courts of any other State of the United States may be proved or admitted in the Courts of this State by the attestation of the Clerk and the seal of the Court annexed, if there be a seal, together with a certificate of the Judge Chief Justice or presiding Magistrate, as the case may be, that the said attestation is in due form.

¹Amended 1854, 95; Abb. Forms, 1595, 1599.

1. A record certified in conformity with the four hundred and fiftieth section of the Practice Act, would be admissible in the Courts of this State. *Parke v. Williams*, 7 Cal. 247.

2. *Held, further*, that the attachment papers of B. & Co. v. V. & Co. were admissible in favor of defendant. See facts. *Dexter v. Paugh*, 18 Cal. 372.

§ 451. *Proof of a judicial record of a foreign country.*

A judicial record of a foreign country may be proved by the production of a copy thereof, certified by the Clerk, with the seal of the Court annexed, if there be a Clerk and seal; or by the legal keeper of the record with the seal of his office annexed, if there be a seal, to be a true copy of such record: together with a certificate of a Judge of the Court, that the person making the certificate is the Clerk of the Court, or the legal keeper of the record, and in either case, that the signature is genuine, and the certificate in due form; and also together with the certificate of the Minister or Ambassador of the United States or of a Consul of the United States, in such foreign country, that there is such a Court, specifying generally the nature of its jurisdiction, and verifying the signature of the Judge and Clerk, or other legal keeper of the record.

1. In the United States, certificates of the proof and acknowledgment of deeds executed in a foreign jurisdiction, are generally received as *prima facie* evidence of both the character of the officers giving them and the genuineness of their signatures. *Mott v. Smith*, 16 Cal. 533.

2. The certificates of a Notary Public or United States Consul, of acknowledgment of a deed, are *prima facie* evidence of the official character of the person by whom they are given. *Id.*

3. The general designation, in the fourth section of the Act of April 16th, 1850, as to conveyances of any Notary Public, or any Consul of the United States, embraces Notaries and Consuls of every grade, whether principal or inferior Notary, or Consul General or Vice Consul. *Id.*

4. *Held*, further, that the exhibits attached to the answer, consisting of copies of the pleadings and proceedings in the action in the United States Circuit Court, needed no further verification than what arises from the statements in the answer that they are such copies; that no distinct verification of them was requisite; and that, were it otherwise, then the certificate of the United States Circuit Court Clerk was sufficient. *Ely v. Frisbie*, 17 Cal. 250.

§ 452. *Proof of copy of a judicial record of a foreign country.*

A copy of the judicial record of a foreign country shall also be admissible in evidence upon proof:

1st. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it;

2d. That such original was in the custody of the Clerk of the Court, or other legal keeper of the same; and,

3d. That the copy is duly attested by a seal, which is proved to be the seal of the Court where the record remains, if it be the record of a Court; or if there be no such seal, or if it be not a record of a Court, by the signature of the legal keeper of the original.

See § 655.

§ 453. *Printed copies of statutes, etc., of another State or Government, published by authority, are presumptive evidence of such laws.*

Printed copies in volumes of statutes, code, or other written law, enacted by any other State, or Territory, or foreign Government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the Courts and judicial tribunals of such State, Territory, or Government, shall be admitted by the Courts and officers of this State, on all occasions, as presumptive evidence of such laws.

See § 655.

§ 454. *Impression of a seal of a Court or public office.*

A seal of a Court or public office, when required to any writ or process, or proceeding, or to authenticate a copy of

any record or document, may be impressed with wax, wafer, or any other substance, and then attached to the writ, process, or proceeding, or to the copy of the record or document, or it may be impressed on the paper alone.

1. The impression of the seal may be made upon paper only. *Cornelly v. Goodwin*, 5 Cal. 220.

2. A scrawl with "L. S." written within it, is sufficient. *Hastings v. Vaughn*, 3 Cal. 315.

TITLE XLVIII.

OF THE WRIT OF CERTIORARI AND OF MANDAMUS.

CHAPTER I.—*The writ of certiorari, or review.*

SECTION 455. The writ of certiorari; denomination of.

456. This writ may be issued by a superior Court to an inferior tribunal; in what cases.

457. The application shall be made on affidavit with notice, or without.

458. The writ to be directed to the inferior tribunal.

459. The contents of the writ.

460. Proceedings in the inferior Court, etc., may be stayed or not.

461. Service of the writ.

462. The review under the writ; extent of.

463. A defective return of the writ may be perfected. Hearing and judgment.

464. Copy of judgment shall be sent to the inferior tribunal, etc.,

465. Judgment roll. Appeals may be taken as in civil actions.

§ 455. *The writ of certiorari, the writ of review.*

The writ of certiorari may be denominated the writ of review.

§ 456. *This writ will be issued by a superior Court to an inferior tribunal; in what cases.*

This writ may be granted on application by any Court of this State, except a Justice's, Recorder's, or Mayor's Court; the writ shall be granted in all cases when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer; and there is no appeal, nor, in the judgment of the Court, any plain, speedy, and adequate remedy.

See § 653.

1. When the writ will lie.—Where error has occurred in proceedings, either civil or criminal, which cannot be reached by a writ of error, the writ of *certiorari* is a proper remedy to correct such error, unless some other statutory remedy has been given. *The People v. Turner*, 1 Cal. 152.

2. Where an order was made by the District Court of the Eighth Judicial District, whereby A. was ordered to be imprisoned forty-eight hours, and fined five hundred dollars, for contempt of Court, without setting forth any of the facts whereon the order was based: *Held*, that a *certiorari* should issue to remove the proceedings for review into this Court; and, *held*, further, that a *mandamus* was not a proper remedy in such a case. *Id.*

3. An order fining and imprisoning for contempt, which does not specify on its face wherein the contempt consisted, will be reversed on *certiorari*. *Ex parte Field*, 1 Cal. 187.

4. C. obtained a judgment against H., in the County Court of Yolo county, for the restitution of certain lands; defendant appealed to the District Court, where the judgment was affirmed; and the defendant again appealed to the Supreme Court, where both judgments were reversed, and the cause remanded to the District Court for further proceedings. After the remittitur was filed in the District Court, the County Court issued a *mandamus* commanding the clerk to issue a writ of restitution, pursuant to the original judgment in that Court; and on the petition of H., a *certiorari* was issued, to remove the proceedings to the Supreme Court. *Held*, on motion to dismiss the writ, that the writ of *certiorari* was the proper remedy; that the judgment to be enforced having been reversed by the Supreme Court, the County Court extended its jurisdiction in issuing the *mandamus*. *Clary v. Hoagland*, 5 Cal. 476.

5. A party against whom a judgment is sought to be enforced, although not a party to the *mandamus*, may apply for a writ of *certiorari*. *Id.*

6. The power to grant a ferry license is not judicial, and its exercise properly belongs to the supervisors. *Chard v. Harrison*, 7 Cal. 113.

7. The exercise of such a power by a County Judge is, therefore, an excess of jurisdiction, which can be properly reviewed on *certiorari*. *Id.*

8. The decision of the board of delegates, in the case of contested election for chief engineer, is a judicial decision, and subject to review by the Courts, on *certiorari*. The extent of such review is simply to inquire whether the board has exceeded its jurisdiction. *Whitney v. Board Delegates S. F. Fire Department*, 14 Cal. 479.

9. As to how far and when the proceedings of such boards are judicial, and hence reviewable on *certiorari*, and how far and when legislative, and hence not so to be reviewed, discussed. *Robinson v. Board of Supervisors of Sacramento*, 16 Cal. 208.

10. A writ of *certiorari* will lie in the District Court, to review the action of the board of supervisors; otherwise, their action would be beyond control. *People v. Supervisors*, 8 Cal. 59.

11. Liability to suit has no necessary connection with ability to sue. Boards of supervisors and bodies like them, without any legislative provision—by general law—are subject, with certain exceptions, to *mandamus*, to enforce the performance of the duties devolved upon them, and to the writ of *certiorari* for the review of their acts when partaking of a judicial character, and in other ways are within the control of judicial proceedings. *Hastings v. City and County of San Francisco*, 18 Cal. 49.

12. A complaint which avers that plaintiff is the owner of a ferry franchise over a stream, and that the board of supervisors have granted license to another person to establish a ferry within less than one mile of plaintiff's ferry, without having published the notice required by statute; and that such ferry is not required by public convenience, nor rendered necessary by the intervention of any creek or ravine; and that the reason given by the board in their minutes for granting the license was, that no legal excuse was shown why it should not be granted, states sufficient facts to authorize the issuance of a writ of *certiorari*. *Murray v. Board of Supervisors of Mariposa County*, 23 Cal. 492.

13. The main point in the case is involved in the second objection, namely: that from the record certified to the Court it did not appear that the board of

supervisors exceeded their jurisdiction in accepting the resignation of the petitioner, and in the rejecting of his bond filed with the board. *Held*, that a board of supervisors has no jurisdiction to reject an official bond, except for the reasons that it is not in form and substance in compliance with the requirements of the statute, or is not executed by sufficient and responsible sureties; and the Supreme Court will review on *certiorari* and amend an order of a board rejecting a bond for any other than one or more of said reasons. *Miller v. Board of Supervisors of Sacramento County*, 25 Cal. 94.

14. Where plaintiff seeks to enjoin a sale of personal property under an execution issued upon a judgment recovered against him in a Justice's Court on the ground that the summons was never served on him, and therefore that the Justice never acquired jurisdiction of his person: *Held*, that if the time for appeal has elapsed he can apply to the County Court for a writ of *certiorari*, and thus review the action of the Justice in rendering the judgment so far as the question of jurisdiction is concerned. *Comstock v. Clemens*, 19 Cal. 78.

15. When the writ will not lie.—A *certiorari* to the Board of Supervisors, on the ground of want of jurisdiction, is premature, if taken before the action of the Board. *Wilson v. Supervisors*, 3 Cal. 386.

16. A writ of *certiorari* is not the proper remedy, where there has been no excess of jurisdiction. *Cutter v. Stark*, 7 Cal. 244.

17. In this case, the application for *certiorari* showing on its face that the party had an adequate legal remedy by appeal, the writ was denied. *Clary v. Hoagland*, 13 Cal. 173.

18. *Certiorari* does not lie where there is an appeal. *People v. Shephard*, 28 Cal. 115.

19. The supreme court may grant the writ.—This Court is strictly a Court of appellate jurisdiction; but it may exercise its appellate jurisdiction by means of the process of *mandamus*. So, also, it seems, by means of the writ of *habeas corpus*, *certiorari*, *supersedeas*, prohibition, etc. *The People v. Turner*, 1 Cal. 143.

20. The Supreme Court may issue a writ of *certiorari* to a District Court for the purpose of reviewing summary proceedings, in a case where no appeal would lie. *Id.* 152.

21. If inferior Courts exceed their powers, the Supreme Court, in every case within its reach, would not fail to interfere by *certiorari*. *Ex parte Hanson*, 2 Cal. 263.

22. The amended Constitution confers upon the Supreme Court original jurisdiction to issue writs of *certiorari*. *Miller v. Board of Supervisors of Sacramento County*, 25 Cal. 95.

23. A writ of *certiorari* will not be issued by the Supreme Court where the act would be the exercise of appellate power, provided the review might have been had by an appeal, although the right of appeal is gone by the lapse of the time within which it was, by statute, required to be taken. *Millicen v. Huber*, 21 Cal. 166.

24. H., against whom a judgment had been rendered in the District Court, after the lapse of more than one year thereafter, applied to the Supreme Court for a writ of *certiorari* to the District Court, by which the judgment might be brought up for review, alleging that the Court below had exceeded its jurisdiction, by rendering the judgment against him without having obtained jurisdiction of his person. *Held*, that the case was not one in which the Court had power to issue the writ. *Id.*

25. The jurisdiction of the Supreme Court to review the proceedings of inferior Courts, boards and officers, upon *certiorari*, is limited to cases where there has been an excess of jurisdiction. *People v. Johnson*, 30 Cal. 98.

26. District courts may grant the writ.—An appeal does not lie from the judgment of a Justice's to the District Court. District Courts cannot entertain jurisdiction of such cases by *certiorari*, where the error complained of might be corrected by an appeal to the County Court. *Gray et al. v. Schupp*, 4 Cal. 185.

27. It is not necessary to the exercise of the power to review, that the Court issuing the writ of *certiorari* should possess appellate jurisdiction; and the writ

may issue from a District Court to a County Judge. *Chard v. Harrison*, 7 Cal. 113; *People v. Board of Supervisors*, 8 Cal. 58.

28. District Judges have power to issue writs of *certiorari*, and to hear them on their return at Chambers. *People v. Supervisors Marin Co.*, 10 Cal. 346.

29. The District Courts have power to grant writs of *certiorari* to review the action of a Board of Supervisors in granting a ferry license. *Murray v. Board of Supervisors of Mariposa Co.*, 23 Cal. 492.

30. **What may be reviewed.**—The review by the Courts extends to every issue of law and fact involved in the question of jurisdiction, and not only the record below, but the evidence itself, when necessary to determine a jurisdictional fact, must be returned. *Whitney v. Board of Delegates S. F. Fire Dep't*, 14 Cal. 479.

31. The review never extends to the merits; upon this the action of the inferior tribunal is final and conclusive. *Id.*

32. We think it is well settled that at common law *certiorari* tries nothing but the jurisdiction, and, incidentally, the regularity of the proceedings upon which the jurisdiction depends. *Id.* 500.

33. Whether the decision of the inferior Court, establishing the existence of a fact essential to the exercise of its jurisdiction, can be attacked in a collateral proceeding, is a question which does not arise in the case, and in relation to which we express no opinion. We have held such a decision is subject to review upon *certiorari*. *Lowe v. Alexander*, 15 Cal. 300.

34. Except in cases of fraud, a claim against a county allowed by such board cannot be collaterally impeached; but the order, allowing the claim, must be reviewed by *certiorari*. *BALDWIN, J. El Dorado Co v. Elstner*, 18 Cal. 144.

35. **Generally.**—To justify the issuing of a writ of *certiorari* from the District Court to review proceedings in an action which has passed to judgment in a County Court, on the ground that the latter Court had no jurisdiction by reason of the excess of the amount in controversy, the affidavits by the applicant must state the amount of the judgment rendered. The question of jurisdiction depends upon the amount of the judgment, and not the amount prayed for in the complaint. *Wratten v. Wilson*, 22 Cal. 465.

36. The proceeding of the taxpayer in the District Court, contemplated by this statute, is a proceeding by *certiorari*, in the form and according to the course of that kind of suit, and the issuance of that writ is necessary to stay the proceedings beyond the ten days, though probably no formal order of injunction is necessary. *C. N. Railroad Company v. Butte County*, 18 Cal. 671.

§ 457. *The application shall be made on affidavit with notice, or without.*

The application shall be made on affidavit by the party beneficially interested, and the Court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

Abb. Forms, 2032, 2033, 2042, and 2043.

§ 458. *The writ to be directed to the inferior tribunal, etc.*

The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the Clerk, if there be one, shall return the writ with the transcript required.

1. A clerk of the board of equalization of taxes, in answer to a writ of *certiorari* requiring the board to certify the proceedings had before them in relation to equalizing the value of property, can return only a transcript of such documents, orders, etc., as remain of record or on file in his office. It is not made the clerk's duty to take down or preserve the evidence. *Central P. R. R. Co. v. Placer County*, 32 Cal. 582.

2. If the board for the equalization of taxes do not take down and preserve the evidence in the matter of equalization of a tax, and have the same filed with their clerk, the evidence cannot be certified by the clerk in his return to a writ of *certiorari*. *Id.*

§ 459. *The contents of the writ.*

The writ of review shall command the party to whom it is directed to certify fully to the Court issuing the writ, at a specified time and place, and annex to the writ a transcript of the record and proceedings, (describing or referring to them, with convenient certainty), that the same may be reviewed by the Court; and requiring the party in the meantime to desist from further proceedings in the matter to be reviewed.

Bancroft's Forms, 520; Abb. Forms, 2034, 2041.

§ 460. *Proceedings in the inferior Court may be stayed, or not.*

If a stay of proceedings be not intended, the words requiring the stay shall be omitted from the writ; these words may be inserted or omitted in the sound discretion of the Court; but if omitted, the power of the inferior Court or officer shall not be suspended, nor the proceedings stayed.

§ 461. *Service of the writ.*

The writ shall be served in the same manner as a summons in civil action, except when otherwise expressly directed by the Court.

462. *The review under the writ; extent of.*

The review upon this writ shall not be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer.

1. The Supreme Court cannot, on *certiorari*, review mere errors of law of the County Court, in cases where it has jurisdiction, even though there is no appeal. *People v. Burney*, 29 Cal. 459.

2. The Supreme Court, on *certiorari*, will only inquire whether the inferior Court exceeded its jurisdiction. *People v. Dwinelle*, 29 Cal. 632.

3. The form and manner of proceeding before the board of delegates in deciding upon a contested election, is for the board to determine, and Courts will not undertake to say what is, or not, sufficient for the board to proceed

upon in the first instance. It is requisite simply that at some point of the proceedings, it appear that the case is within the terms of the law. *People ex rel. Whitney v. Board of Delegates of the San Francisco Fire Department*, 14 Cal. 479.

4. The decision of the board of delegates in the case of a contested election for chief engineer is a judicial decision, and subject to review by the Courts on *certiorari*. The extent of such review is simply to inquire whether the board has exceeded its jurisdiction. *Id.*

5. At common law the writ of *certiorari* tries nothing but the jurisdiction, and incidentally the regularity of the proceedings upon which the jurisdiction depends. The review never extends to the merits; upon these the action of the inferior tribunal is final and conclusive. *Id.*

6. Our statute is affirmatory of the common law. *People ex rel. Church v. Hester* (6 Cal. 679), overruled in this respect. *Id.*

7. The review by the Courts extends to every issue of law and fact involved in the question of jurisdiction, and not only the record below, but evidence itself, when necessary to determine a jurisdictional fact, must be returned. *Id.*

§ 463. *A defective return of the writ may be perfected. Hearing and judgment.*

If the return of the writ be defective, the Court may order a further return to be made. When a full return has been made, the Court shall proceed to hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming, or annulling, or modifying the proceedings below.

Abb. Forms, 2037 and 2045.

1. When a case is brought from an inferior Court or tribunal to the Supreme Court by *certiorari*, if all the facts upon which the Court below acted are not in the record, the Supreme Court may require the Court below to certify such facts. *Blair v. Hamilton*, 32 Cal. 49.

2. The return of a finding of facts made by a County Judge to writ of *certiorari* constitutes a part of the record within the meaning of the four hundred and sixty-third section of the Practice Act, though the finding is not made until the next term after the testimony is taken, and the order or judgment based on it is made. *Id.*

3. A clerk of the board for the equalization of taxes, in answer to a writ of *certiorari* requiring the board to certify the proceedings had before them in relation to equalizing the value of property, can return only a transcript of such documents, orders, etc., as remain of record or on file in his office. *C. P. R. R. Co. v. Placer Co.*, 32 Cal. 582.

4. If the board for the equalization of taxes do not take down and preserve the evidence in a matter of equalization of a tax, and have the same filed with the clerk, the evidence cannot be certified by the clerk in his return to a writ of *certiorari*. *Id.*

§ 464. *Copy of judgment shall be sent to the inferior tribunal.*

A copy of the judgment, signed by the Clerk, shall be transmitted to the inferior tribunal, board, or officer, having the custody of the record or proceeding certified up.

§ 465. *Judgment roll. Appeals may be taken as in civil actions.*

A copy of the judgment, signed by the Clerk, entered upon, or attached to, the writ and return, shall constitute the judgment roll. If the proceeding be had in any other than the Supreme Court, an appeal may be taken from the judgment in the same manner, and upon the same terms, as from a judgment in a civil action.

For costs on writ of review, see § 508.

TITLE XLIX.

CHAPTER II.—*The writ of mandate, or mandamus.*

SECTION 466. The writ of mandamus, denomination of.

467. The writ may be issued by a superior Court to an inferior tribunal, etc., in what cases.

468. The writ shall issue on affidavit, where there is no adequate remedy in the ordinary course of law.

469. Shall be either alternative or peremptory. Substance of the writ.

470. If the application be without notice, the alternative writ shall issue; otherwise, the peremptory. Notice and default.

471. The adverse party may answer under oath.

472. If an essential question of fact is raised, the Court may order a jury trial.

473. The applicant may demur to the answer or countervail it by proof.

474. Either party may move for a new trial. Two verdicts for the same party shall be conclusive.

475. The Clerk shall transmit the verdict to the Court where the motion is pending, after which the hearing shall be had on motion.

476. If no answer be made, or if the answer raise no material issue of fact, the hearing shall be before the Court.

477. If the applicant succeed, he may have damages, costs, and a peremptory mandate.

478. Service of the writ.

479. Penalty for disobedience to the writ of mandate.

§ 466. *The writ of mandamus, denomination of.*

The writ of *mandamus* may be denominated the writ of mandate.

§ 467. *The writ may be issued by a Superior Court to an inferior tribunal; in what cases.*

It may be issued by any Court in this State, except a Justice's, Recorder's, or Mayor's Court, to any inferior tribunal,

corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

1. The rules of the Civil Practice Act are applicable to pleadings and proceedings in mandamus. *People v. Supervisors of San Francisco*, 27 Cal. 655.

2. When the writ will lie.—The Court will not undertake in the first instance to supervise, direct, or control the acts or omissions of a mere ministerial officer; but when the effect of the application is to bring under review the decision of a District Court, the appellate jurisdiction given by the constitution attaches, and may be exercised by means of the writ of mandamus. *The People v. Turner*, 1 Cal. 143.

3. When an order had been made by the District Court of the Eighth Judicial District, expelling certain attorneys from the bar, on the ground that they had set at defiance the authority of the Court, and had vilified and denounced its proceedings, but no notice had been given them of the charges against them, and no opportunity afforded to make their defense: Held, that a writ should issue commanding the District Court to vacate the order, and restore the parties. *Id.*

4. The writ of mandamus is a proper remedy to compel the District Court to restore an attorney whose name has been stricken from the rolls by the order of such Court. *Id.*

5. A mandamus may issue to compel the Comptroller of State to account to a member of the Legislature for the daily compensation fixed by law. *Fowler v. Pierce*, 2 Cal. 165; *McCauley v. Brooks*, 16 Cal. 11.

6. A mandamus lies to compel the Judge of a District Court to enter judgment on the report of a referee. In this case there was no remedy by appeal. *Russell v. Elliott*, 2 Cal. 245.

7. Mandamus will lie to compel the Clerk of the Common Council of San Francisco to make publication of certain notices which it is his duty to publish. *Washington et al. v. Page*, 4 Cal. 388.

8. Mandamus may be resorted to, to compel an officer to do an act which is sought to be enforced, in all cases where the officer has no discretion, and where he is under obligation to do the specific act, and there is no adequate remedy in the ordinary course of law. *The People ex rel. McDougall v. Bell*, 4 Cal. 176; *Flayley v. Hubbard*, 22 Cal. 36.

9. Where the District Court granted an injunction, from the order granting which the defendant appealed and then disobeyed the injunction, whereupon plaintiff asked for an attachment for contempt, which was refused, on the ground that the appeal superseded the injunction: Held, that a mandamus may issue to compel the District Judge to issue the attachment, the plaintiff's remedy, by appeal, being inadequate. *Merced Mining Co. v. Fremont*, 7 Cal. 130.

10. A mandamus will issue from a superior to an inferior Court, to compel the issuance of an attachment for contempt, where the proceeding is, in substance, a private right, though in form a case of contempt. *Id.*

11. The writ of mandamus can only be issued to compel the performance of an act or duty clearly enjoined by law, and in a case where the party has no other plain, speedy and adequate remedy. *Draper v. Noteware*, 7 Cal. 276.

12. Where supervisors, in the exercise of their discretion, determined after hearing the testimony that a ferry had not been properly kept, and therefore granted it to another, there is no authority to interfere with their determination; but when they act under mistake of law, and award the license to another, supposing that he has succeeded to the rights of the owner of the franchise, the error may be corrected by mandamus or any other proper proceeding. *Thomas v. Armstrong*, 7 Cal. 287; *Fall v. Paine*, 23 Cal. 392; 21 Cal. 683.

13. Where, pending a motion for a new trial in the District Court, the defendants violate an injunction previously issued by said District Court, this Court will issue a *mandamus* against the Judge of such District Court, to compel him to issue his attachment for contempt. *Ortman v. Dixon*, 9 Cal. 23.

14. The Supreme Court has the right to compel inferior tribunals to proceed to hear and determine causes of which they refuse to take cognizance, and this by virtue of its appellate powers, and its authority to issue process necessary to give them effect. *Purcell v. McKune*, 14 Cal. 231.

15. A *mandamus* may issue to compel a Judge to settle a bill of exceptions first, and then to sign it. *The People v. Lee*, 14 Cal. 512.

16. The State prison contract between the State and Estill remaining obligatory, not qualified by any legislation, it was the duty of the controller, upon demand of relators—assignees of Estill—to have issued warrants upon the treasurer for the sums claimed under the contract; and the performance of this can be enforced by *mandamus*. *McCauley v. Brooks*, 16 Cal. 11.

17. Relator conveyed to Y. one-third of certain real estate, in consideration that Y. should attend to a suit pending in the name of relator for the recovery of the property. Y. employed an attorney to conduct the suit, the attorney of plaintiff being discharged. Relator moved the Court below to substitute another attorney in place of the one employed by Y.; the Court refused to grant the motion, the only reason urged for the substitution being that Y. had neglected to prosecute the suit, and it not being shown that the agreement between him and relator had been canceled by the parties. Relator applies to this Court for *mandamus*. *Held*, that the writ lies; that the agreement between relator and Y. does not exclude the former from the right to prosecute the suit, and employ such attorney as he chooses; that the exercise of this right will not affect any right Y. may have in the property or suit; that he may intervene if a proper case be made, or prosecute his rights independently or wait until a recovery, and then claim his rights under the contract with relator. *Downer v. Norton*, 16 Cal. 436.

18. The "Spring Valley Water Works" petitioned the County Judge of San Mateo County, under the act of 1858 (Statutes 1858, § 218), to appoint commissioners to appraise the value of certain lands "required for the purposes of the company," and the Judge, on inspection of the article of incorporation, held that the company was not a corporation, because the articles did not show where the principal place of business of the company is to be located—the articles stating simply that San Francisco was the place of business—and dismissed the application, and all proceedings based thereon. The company apply to the Supreme Court for a *certiorari*. *Held*, that the writ does not lie; that the dismissal of the petition for the cause assigned is not an excess of jurisdiction under the act of 1858, and that *mandamus* from the District Court is the proper remedy. *Ex parte Spring Valley Water Works*, 17 Cal. 132.

19. To authorize a *mandamus* it must appear not only that the performance of the act to enforce which the writ is asked is a duty resulting from the office, trust, or station of the party to whom the writ is to be directed, but that the performance has been requested and refused. *People v. Romero*, 18 Cal. 89; *Crandall v. Amador County*, 20 Cal. 72.

20. A writ of mandate will be granted to compel an assessor to assess for taxation property liable to be taxed, and which he neglects and refuses to assess. *People v. Shearer*, 30 Cal. 645.

21. An order made in an action pending in the District Court, staying all proceedings therein until the further direction of the Court, is not an appealable order. The remedy of a party prejudiced thereby is by application for a *mandamus* to compel the Court to proceed. *Rhodes v. Craig*, 21 Cal. 419.

22. The board of supervisors act ministerially in the issuance of bonds under this act, and *mandamus* lies if they improperly refuse. *C. N. Railroad Company v. Butte Co.*, 18 Cal. 671.

23. A writ of mandate will be granted to compel a subordinate tribunal to perform a duty enjoined by law, and which it refuses to perform; but when the act to be done is judicial or discretionary, the writ will not direct what

decision shall be made, nor will it be granted after the inferior tribunal has acted for the purpose of reviewing the legality of its decision. *People v. Seaton*, 24 Cal. 78.

24. When the writ will not lie.—Where an order was made by the District Court of the Eighth Judicial District, whereby A. was ordered to be imprisoned forty-eight hours, and fined five hundred dollars for contempt of Court, without setting forth any of the facts whereon the order was based: *Held*, that a *certiorari* should issue to remove the proceedings for review into this Court; and *Held*, further, that a *mandamus* was not a proper remedy in such a case. *The People v. Turner*, 1 Cal. 152.

25. A *mandamus* is not the proper remedy when an inferior Court refuses to enter a judgment for costs. The party complaining may appeal, or bring his action for the costs. *Peralta v. Adams*, 2 Cal. 594.

26. A *mandamus* will not lie where there is any other specific, speedy and adequate remedy. *The People v. Olds*, 3 Cal. 173; *Bigelow v. Grove*, 7 Cal. 133.

27. *Mandamus* will not issue to compel any person, inferior officer, Court or corporation, to act in any particular manner, when such person, officer, Court or corporation is invested with discretionary power. *McDowall v. Bell*, 4 Cal. 177.

28. *Mandamus* does not lie to compel the supervisors of a county to order a special election to fill vacancies in the office of assessor and sheriff. *The People v. Supervisors of Santa Barbara County*, 14 Cal. 102.

29. A *mandamus* will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase money, on the ground that he is entitled to it as oldest judgment and execution creditor; especially when there is an unsettled contest as to the priority of his lien. *Williams v. Smith*, 6 Cal. 91.

30. A *mandamus* to a board of supervisors to issue a warrant for a specified sum is irregular; it should direct them to audit the account, and issue warrants accordingly. *Tuolumne Co. v. Stanislaus Co.*, 6 Cal. 440.

31. A *mandamus* will not issue to compel the Court below to enter a decree upon the report of a referee; the remedy is by appeal. *Ludlum v. Fourth District Court*, 9 Cal. 12.

32. Where an injunction, granted on an *ex parte* application, was modified on motion of defendant, without notice to plaintiff, on defendant's giving bond: *Held*, that subsequent acts of defendant, in violation of the original injunction, were not in contempt. The remedy of the plaintiff, if there was error in the order modifying the injunction, is by appeal; but he cannot have a *mandamus* to compel the issuance of attachment for contempt. *Fremont v. Merced Mining Co.*, 9 Cal. 18.

33. A *mandamus* will not lie against the clerk of the District Court, to compel him to issue execution on a money judgment, rendered in the Court of which he is clerk. *Goodwin v. Glaser*, 10 Cal. 333.

34. When the board of supervisors of a county have canvassed the return of an election, and, in the exercise of their discretion, declared the result of an election adversely to a party claiming to have been elected, a *mandamus* will not lie, upon the application of such party, to compel the board to issue to him a certificate of election. *Magee v. Board of Supervisors of Calaveras Co.*, 19 Cal. 376.

35. A *mandamus* will not lie against a County Treasurer to compel him to pay interest due on county bonds. *People ex rel. Tullant & Wilde v. Fogg, Treasurer*, 11 Cal. 351.

36. *Mandamus* does not lie to compel the supervisors of a county to order a special election to fill vacancies in the offices of assessor and sheriff. *Packard v. Board of Supervisors of Santa Barbara Co.*, 14 Cal. 102.

37. Where the Judge below requires a statement in a chancery case, and the attorney does not object, but fails to furnish it, and in consequence thereof, the Court, on motion of plaintiffs for judgment on the pleadings and verdict, refuses to proceed until such statement is furnished, *mandamus* will not lie. *Parcell v. McKune*, 14 Cal. 230.

38. In forcible entry and detainer tried in the County Court on appeal from a Justice's Court, plaintiff having obtained a verdict for one hundred and fifty

dollars damages, moved that they be trebled. Motion denied, and judgment entered for one hundred and fifty dollars, with restitution of the premises. Plaintiff applies to the Supreme Court for *mandamus* to compel the Court below to render judgment for treble damages. *Held*, that the application must be denied, as plaintiff has an adequate remedy by appeal; pending which, plaintiff can enforce so much of the judgment as awards restitution. The judgment can be corrected in this Court, if proper, by trebling the damages. *Early v. Mannix*, 15 Cal. 149.

39. Where the law, creating the county of Fresno, provided that the County Judge to be elected "shall receive for his service such sum annually, as shall be determined by the board of supervisors, not to exceed \$3,000, to be paid," etc.: *Held*, that the Legislature did not by this clause fix the salary of the Judge; and that *mandamus* for five hundred dollars—the difference between the \$3,000 and the \$2,500 fixed by the board some weeks after relator's election, as the annual compensation of the Judge—does not lie. *Hart v. Johnson*, 17 Cal. 305.

40. *Mandamus* is not the proper remedy when a District Court refuses to transfer an indictment for murder pending therein to another District Court for trial—the Legislature having passed a special act directing said Court to transfer said indictment. *Smith v. Judge of the Twelfth District*, 17 Cal. 547.

41. *Mandamus* will not lie to compel a Court to proceed with the trial of an action after an order has been made changing the place of trial. The remedy, if an injury is sustained, is by an appeal from the final judgment. *People v. Sedon*, 24 Cal. 78.

42. *Mandamus* is not the proper remedy for the enforcement of a claim against a county, which has been presented to the board of supervisors of the county, and by them rejected. In such cases, the statute authorizing the party to sue the county, has given him a plain, speedy and adequate remedy at law. The writ of *mandamus* belongs only to such as have legal rights to enforce and find themselves without an appropriate legal remedy. *Crandall v. Amador County*, 20 Cal. 72.

43. A writ of mandate will not be issued by the Supreme Court to a County Judge, commanding him to recall an order made after final judgment, from which order an appeal could have been taken. *People v. Moore*, 29 Cal. 427.

44. *Mandamus* does not lie to compel an inferior tribunal to act in a particular manner in a matter respecting which it is invested with discretionary power. *The People ex rel. Hagley v. Hubbard*, 22 Cal. 34. See *People v. Weston*, 28 Cal. 640, and authorities there cited.

45. The action of a Justice's Court in granting or refusing a change of venue, cannot be reviewed in an application for a *mandamus*. By this writ, the Justice may, in case of his refusal, be compelled to act, but his erroneous action cannot be thus corrected. The remedy is by appeal. *Id.*

46. The constitutionality of the first section of the law of 1861, concerning Intelligence Offices in San Francisco, cannot be tested in a proceeding by *mandamus* against the board of supervisors to compel an order by them for the issuance of a license to a person applying therefor under said act. *Hall v. Supervisors of San Francisco*, 20 Cal. 591.

47. If the plaintiff in an action moves for a judgment of dismissal at his costs, and the motion is resisted by the defendant, and denied by the Court, a writ of mandate will not be issued commanding the judge to enter a judgment of dismissal. *People v. Pratt*, 28 Cal. 166.

48. In refusing to enter a judgment of dismissal in an action on plaintiff's motion, the Judge acts judicially, and a *mandamus* does not lie to compel him to reverse his decision and render a different one. *Id.*

49. Where the act to be done is judicial and discretionary, a writ of mandate cannot direct what judgment shall be rendered, nor can it be granted after an inferior tribunal has acted for the purpose of reviewing its decision. *Id.*

50. If, in acting judicially, the Court commits an error, the remedy is by appeal, and not by *mandamus*. *Id.*

51. In an application for *mandamus* to compel a sheriff to remove from possession of the premises under a writ of restitution, an occupant who was not a party to the action, it must be shown distinctly by the affidavits that his

possession was acquired under the parties or subsequent to the filing of a *lis pendens*. If these matters are left in doubt, the application will be denied. *Fogarty v. Sparks*, 22 Cal. 143.

52. A judgment rendered by a Court in a case where it had jurisdiction will not be disturbed by a writ of mandate, however erroneous. *Cariaga v. Dryden*, 27 Cal. 307.

53. If a County Judge rendered an erroneous judgment in a matter where he possesses jurisdiction, a writ of mandate will not be awarded to compel him to render a different judgment. *Id.*, 30 Cal. 244.

54. **County court.**—Proceedings for a *mandamus* to compel the execution of a sheriff's deed to a redemptioner, after sixty days from the redemption, under section two hundred and thirty-two of the Practice Act, can be commenced in the county where the relator resides; the provision of the statute that actions against a public officer for acts done by him in virtue of his office, shall be tried in the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, by which, in the execution of process, or otherwise, he interferes with the rights or property of these persons, and not to mere omissions or neglect of official duty. *McMillan v. Richards*, 9 Cal. 365.

55. If a County Judge refuses to appoint commissioners to appraise land in a proceeding to condemn the same, a writ of mandate will be issued compelling him to do so. *Lake Merced Water Co. v. Cowles*, 31 Cal. 215.

56. If notice of appeal is given from an order of a Justice of the Peace, directing stolen property to be delivered to the alleged owner, the County Court has no jurisdiction to compel, by writ of mandate, the Justice of the Peace to send up the appeal papers. *People v. Holloway*, 26 Cal. 651.

57. In such cases the County Court can only inquire by the intervention of a Grand Jury, whether a public offense has been committed in the county. *Id.*

58. **District court.**—The fourth section of the sixth article of the Constitution of the State, as amended in 1863, confers upon the District Courts original jurisdiction to issue writs of *mandamus*, *certiorari*, prohibition and *habeas corpus*. *Perry v. Ames*, 26 Cal. 381. Affirmed in *Courtwright v. B. R. & A. W. & M. Co.*, 30 Cal. 583.

59. District Courts have jurisdiction to issue writs of mandate regardless of the amount involved in the action. *Cariaga v. Dryden*, 30 Cal. 244.

60. The Supreme Court can issue a mandate in a proper case, in aid of its appellate jurisdiction, but to do so it must have such jurisdiction in the given case. When the act to be done is judicial in its character, the writ will not direct in what manner the inferior officer shall act, but only direct him to act. In dismissing an appeal the County Court acts judicially. *People ex rel. v. Weston*, 28 Cal. 639. [See authorities cited in this case.]

61. A Justice of the Supreme Court has no power to issue a writ of *mandamus*, alternative or peremptory. *People ex rel. Cobb v. Board of Supervisors of San Joaquin County*, April T. 1865.

62. Under the Constitution as amended, the Supreme Court has original jurisdiction to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*. *Tyler v. Houghton*, 25 Cal. 26.

63. **To whom the writ will issue.**—Liability to suit has necessary connections with ability to sue. Boards of Supervisors and bodies like them, without any legislative provision—by general law—are subject, with certain exceptions, to *mandamus* to enforce the performance of the duties devolved upon them, and to the writ of *certiorari* for the review of their acts when partaking of a judicial character, and in other ways are within the control of judicial proceedings. *Hastings v. City and County of San Francisco*, 18 Cal. 49.

64. *Mandamus* will issue to the Governor in certain cases. *McDowley v. Brooks*, 16 Cal. 11.

65. Distinction, from political considerations, between the Governor and the inferior officers of the Executive Department, as to the issuance of this writ, stated. *Id.*

66. A *mandamus* will issue from a superior to an inferior Court, to compel the issuance of an attachment for contempt, where the proceeding is, in sub-

stance, a private right, though in form a case of contempt. *Merced Mining Co. v. Fremont*, 7 Cal. 130.

67. This Court will not issue a *mandamus* to the clerks of the District Courts in the first instance. The action, or the refusal to act, of the clerks, in suits pending in the several Courts of the State, can only be reviewed in this Court through the ruling—in relation to such action or refusal—of the Courts of which they are the ministerial officers. *Covell v. Buckelew*, 14 Cal. 640.

68. A writ of mandate will issue to compel a Justice of the Peace to enter a judgment of discontinuance. *Anderson v. Pennie*, 32 Cal. 265.

69. If land sold by State officers was the property of the State, and all the acts required by law prior to the issuing of the patent have been duly performed, and the purchaser is competent to purchase, a writ of mandate will be issued to compel the Governor to sign the patent, unless the law has vested him with discretionary powers in that respect. *Middleton v. Low*, 30 Cal. 596.

70. When a ministerial duty affecting a private right is specially devolved on the Governor by law, which the Legislature might have devolved on any other State officer, he may be compelled to perform the same by a writ of mandate. *Id.*

71. The Governor will not be compelled by writ of mandate to sign a patent for land embraced in a sixteenth or thirty-sixth section which has not been surveyed by the United States, or which lies within the limits of a Mexican or Spanish grant. *Id.*

72. The board of supervisors of the city and county of San Francisco have authority, and it is their duty to provide for the payment of judgments recovered against the city of San Francisco. They have no discretion, except between two courses of procedure. They must either appropriate for this purpose money already in the treasury, or they must raise the money by taxation. *People ex rel. Frank v. San Francisco*, 21 Cal. 668.

73. Generally.—In an application for a *mandamus*, the statute does not require a replication, except when, in the discretion of the Court, it is necessary to explain or avoid facts set up in the defendant's answer. *Fowler v. Peiros*, 2 Cal. 165.

74. The distinction between writs of mandate and *quo warranto*, as held in England, is not abolished by the statute of this State, but is fully recognized. *People v. Olds*, 3 Cal. 173.

75. Proceedings for a *mandamus* to compel the execution of a sheriff's deed to a redemptioner, can be commenced in the county where the relator resides. *McMillan v. Richards*, 9 Cal. 420.

76. The proceeding does not involve the determination of a right or interest in real estate. The relator claims only an official document, the possession of which will enable him to assert any rights he may have acquired. The awarding of the *mandamus* cannot determine these rights, or in any respect the interest of third parties. *McMillan v. Richards*, 9 Cal. 365.

77. A *mandamus* directing a board of supervisors to proceed and audit certain accounts of the relator, does not necessarily require the board to allow the accounts; such board have a discretion in respect to their action in this regard, though compelled to act on the subject matter of the claim; such writ does not control or prescribe the mode, or determine the result of their action. *People ex rel. Gas Co. v. Supervisors of San Francisco*, 11 Cal. 42; 6 Id. 440; 19 Id. 150.

78. Judgment may be affirmed as to the *mandamus*, and reversed as to the costs. *McDougal v. Roman*, 2 Cal. 80.

79. On *mandamus* by the assignee of a sheriff's certificate of sale to compel the execution of a deed, the question whether such certificate is not merged in a deed made to the assignee by the execution debtor after the sale, cannot be tried. *People v. Irwin*, 14 Cal. 428.

80. To authorize a *mandamus*, it must appear not only that the performance of the act to enforce, which the writ is asked, is a duty resulting from the office, trust or station of the board or party to whom the writ is to be directed, but that the performance has been requested and refused. *Crandall v. Amador County*, 20 Cal. 72.

81. Under the Revenue Act of 1861, it is the duty of a tax collector to execute and deliver to a person, paying his taxes in the coin therein designated, a receipt for the same, and the performance of this duty may be enforced by *mandamus*. *Perry v. Washburn*, 20 Cal. 318.

82. If, on an appeal, the Supreme Court of the United States simply affirm the judgment of the Circuit Court, the judgment thus affirmed becomes final, and the Circuit Court has no jurisdiction on the return of the mandate of the Supreme Court to render a new judgment. *Mulford v. Estudillo*, 32 Cal. 131.

83. On the return of a mandate from the Supreme Court of the United States to the Circuit Court, affirming the judgment of the Circuit Court, a new judgment cannot be rendered by the Circuit Court. *Id.*

84. The writ of mandate cannot be abated by another action for the same cause. *Calaveras County v. Brockway*, 30 Cal. 325.

85. A *mandamus* could only compel the board to act, but could not direct their action; and the rejection of the account is an action upon it, which is all a *mandamus* could require, where the compensation claimed in the account is not fixed by law. *Price v. Sacramento County*, 6 Cal. 254.

86. Proceeding by *mandamus* is the proper remedy to compel Judges to hold their Courts, and county officers to keep their offices at a county seat. *Calaveras County v. Brockway*, 30 Cal. 325.

87. Where a public body or officer has been empowered to do an act which concerns the public interest, the execution of the power may be enforced by writ of mandate. *Napa Valley R. R. Co. v. Napa County*, 30 Cal. 435.

88. Railroads concern the public interest as matter of legal judgment and where the board of supervisors of a county are empowered to subscribe for the county to the capital stock, they may be compelled to subscribe by writ of mandate. *Id.*

89. In an application for a *mandamus* to a county treasurer, to pay county warrants, it is sufficient to aver in the petition that the warrants were drawn by the county auditor, as it will not be presumed that the auditor has violated his duty in issuing the warrants: but the county treasurer has a right to show in defense that the warrants were founded on a demand not legally chargeable against the county. *Connor v. Morris*, 23 Cal. 447.

§ 468. *The writ shall issue, on affidavit, where there is no adequate remedy in the ordinary course of law.*

This writ shall be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.

1. A complaint in *mandamus*, against the Comptroller, is bad if it fails to allege that there is "money not otherwise appropriated by law," out of which the compensation in question is to be paid. *Redding v. Bell*, 4 Cal. 333.

2. To supersede the remedy by *mandamus*, a party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject matter of his application. *Fremont v. Crippen*, 10 Cal. 211; 7 Id. 276.

3. Neither a remedy by criminal prosecution, nor by action on the case for neglect of duty, will supersede that by *mandamus*, since it cannot compel a specific act to be done, and is, therefore, not equally convenient, beneficial, and effectual. *Fremont v. Crippen*, 10 Cal. 211.

4. An application for the writ of mandate must be prosecuted in the name of the real party in interest, and if the name of the people is used, and the people have no interest, and the relator alone is interested, the writ will be denied. *People v. Pacheco*, 29 Cal. 210.

5. In an application for a writ of mandate to compel a board of supervisors to levy a tax, the county into whose treasury the money intended to be raised by the tax will go, can be the relator. *People v. Alameda County*, 26 Cal. 641.

§ 469. *Shall be either alternative or peremptory. Substance of the writ.*

The writ shall be either alternative or peremptory; the alternative writ shall state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the Court, at a specified time and place, why he has not done so. The peremptory writ shall be in a similar form, except that the words requiring the party to show cause why he has not done as commanded shall be omitted, and a return day shall be inserted.

Bancroft's Forms, 571-572; Abb. Forms, 2068-2073.

1. Where notice of the motion for a *mandamus*, and a copy of the papers on which the motion is founded, have been duly served on the District Judge, this Court may, in its discretion, issue either an alternative, or a peremptory writ, in the first instance. *People v. Turner*, 1 Cal. 143.

§ 470. *If the application be without notice, the alternative writ shall issue, otherwise the peremptory. Notice and default.*

When the application to the Court is made without notice to the adverse party, and the writ be allowed, the alternative shall be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory may be issued in the first instance. The notice of the application, when given, shall be at least ten days. The writ shall not be granted by default. The case shall be heard by the Court, whether the adverse party appear or not.

Abb. Forms, 2067.

§ 471. *The adverse party may answer under oath.*

On the return of the alternative, or the day on which the application of the writ is noticed, or such further day as the Court may allow, the party on whom the writ or notice shall have been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.

1. In a proceeding against a board of supervisors, in its corporate capacity, to procure a writ of mandate, the answer of one, or more than one, of the Supervisors in his or their own name or names, whether as supervisors or otherwise, cannot be regarded as the answer of the board, and, on motion, will be stricken from the files of the Court. *People v. Supervisors of San Francisco*, 27 Cal. 665.

2. In such case the answer should be in form—the answer of the board in its aggregate capacity. *Id.*

3. In such case, if answer is filed in due form as the answer of the board, the presumption is that it is the answer of the board; and the fact that it was sworn to by one member of the board does not make it his answer, nor is it necessary that such answer should aver that the board by resolution adopted it. *Id.*

4. In such case, if two answers filed, each in form of the answer of the board, the Court may ascertain which is the return of the majority. *Id.*

5. In proceeding to procure a writ of mandate, a motion of the relator for judgment on the pleading is equivalent to a demurrer to the answer, on the ground that it does not state facts sufficient to constitute a defense to the action. Objections to the answer, which are required to be taken by special demurrer, or by motion to strike out, will be disregarded on such motion. *Id.*

6. Where a writ of *mandamus* is asked against a county treasurer, to compel him to pay a warrant drawn upon him by the auditor, the treasurer may show in defense that the warrant is founded upon a demand not legally chargeable against the county, and upon such showing the writ will be refused. *Keller v. Hyde*, 20 Cal. 594; *Connor v. Morris*, 23 Cal. 451.

§ 472. *If an essential question of fact is raised, the Court may order a jury trial.*

If an answer be made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the Court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the Court. The question to be tried shall be distinctly stated in the order for trial, and the county shall be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

1. In an application for a *mandamus* to compel a District Judge to sign a bill of exceptions, which the relator alleges he refuses to do, and where the District Judge, in his answer, avers that he has signed a true bill of exceptions, and that the one presented by relator is not a true bill, relator is not entitled to a jury to try the issue, under section four hundred and seventy-two of the Practice Act. *People ex rel. Galvin v. The Judge of the Tenth Judicial District*, 9 Cal. 19.

2. Where an alternative *mandamus* was issued to a Justice of the Peace to compel him to send up papers on appeal to the County Court, to which he answered that his fees had not been paid or tendered "prior to the service of the alternate writ." *Held*, his answer is no defense to the writ being made peremptory, as the fees may have been paid since the service of the writ. *People ex rel. Hamilton v. Harris*, 9 Cal. 571.

3. If a question of fact upon issues joined arises in a proceeding by *mandamus* commenced in the Supreme Court, that Court will refer the matter to a District Court to try and determine the special fact in issue, and return the fact to the Supreme Court. *Calaveras County v. Brockway*, 30 Cal. 325.

§ 473. *The applicant may demur to the answer or countervail it by proof.*

On the trial, the applicant shall not be precluded by the answer of any valid objection to its sufficiency, and may counteravail it by proof either in direct denial or by way of avoidance.

§ 474. *Either party may move for a new trial. Two verdicts for the same party shall be conclusive.*

If either party be dissatisfied with the verdict of the jury, he may move for a new trial upon a statement prepared as provided in section one hundred and ninety-five. The motion for a new trial may, upon reasonable notice, be brought on before the Judge of the Court in which the cause was tried, either in term or vacation. If a new trial be granted, the jury shall, within five days thereafter, unless the parties agree on a longer time, be summoned to try the issue. After a second verdict in favor of the same party, a new trial shall not be had.

§ 475. *The Clerk shall transmit the verdict to the Court where the motion is pending, after which the hearing shall be had on motion.*

If no notice for a new trial be given, or if given, be denied, the Clerk, within five days after the rendition of the verdict or denial of the motion, shall transmit to the Court in which the application for the writ is pending, a certified copy of the verdict attached to the order of trial; after which either party may bring on the argument of the application, upon reasonable notice to the adverse party.

§ 476. *If no answer be made, or if the answer raise no material issue of fact, the hearing shall be before the Court.*

If no answer be made, the case shall be heard on the papers of the applicant. If an answer be made which does not raise a question such as is mentioned in section four hundred and seventy-two, but only such matters as may be explained or avoided by a reply, the Court may, in its discretion, grant time for replying. If the answer, or answer and reply, raise only questions of law, or put in issue immaterial statements, not affecting the substantial rights of the parties, the Court shall proceed to hear, or fix a day for hearing the argument of the case.

§ 477. *If the applicant succeed, he may have damages, costs, and a peremptory mandate.*

If judgment be given for the applicant, he shall recover the damages which he shall have sustained, as found by the jury, or as may be determined by the Court, or referees, upon a reference to be ordered, together with costs ; and for such damages and costs an execution may issue ; and a peremptory mandate shall also be awarded without delay.

1. If the relator, in proceedings to procure a writ of mandate, proceeds by petition and notice for a peremptory writ without procuring an alternative writ, the Court may grant any relief consistent with the case made by the petition and embraced within the issue, although it may be only part of that asked in the prayer of the petition. *People v. Supervisors of San Francisco*, 27 Cal. 665.

§ 478. *Service of the writ.*

The writ shall be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the Court.

§ 479. *Penalty for disobedience to the writ of mandate.*

When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the Court that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the Court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the Court may order the party to be imprisoned for a period not exceeding three months, and may make any orders necessary and proper for the complete enforcement of the writ. If a fine be imposed upon a Judge or officer who draws a salary from the State or county, a certified copy of the order shall be forwarded to the Comptroller, or County Treasurer, as the case may be, and the amount thereof may be retained from the salary of such Judge or officer. Such Judge or officer for his willful disobedience shall also be deemed guilty of a misdemeanor in office.

1. The Legislature has declared that an officer for willful disobedience to the mandate of the Court, shall be guilty of a misdemeanor in office. *McCawley v. Brooks*, 16 Cal. 56.

TITLE L.*

OF CONTEMPTS AND THEIR PUNISHMENT.

- SECTION 480.** Contempts, what shall be deemed.
481. A contempt committed in the presence of the Court may be punished summarily; when not so committed, an affidavit or statement shall be made.
482. A warrant of attachment to answer may issue, or notice to show cause.
483. Bail may be given by a person arrested under such warrant.
484. Sheriff shall, upon executing the warrant, arrest and detain the person until discharged.
485. Bail bond, form and condition of.
486. Office shall return warrant and bail bond, if any.
487. Hearing.
488. Judgment and penalty if guilty.
489. If the contempt is the omission to perform any act, the person may be imprisoned until performance.
490. Persons in contempt may also be indicted, if an indictable offense.
491. If the party fail to appear, proceedings.
492. Illness sufficient excuse for non-appearance of party arrested. Confinements under arrests for contempt.
493. Judgments and orders in such cases final. Extent of punishment.

§ 480. *Contempt, what shall be deemed.*

The following acts or omission shall be deemed contempts :

1st. Disorderly, contemptuous, or insolent behaviour, towards the Judge whilst holding Court, or engaged in his judicial duties at chambers, or towards referees or arbitrators whilst sitting on a reference or arbitration, tending to interrupt the due course of a trial, reference, or arbitration, or other judicial proceeding ;

2d. A breach of the peace, boisterous conduct or violent

*STATUTES OF 1862, 115.

An act for the punishment of contempts and trespasses.

SECTION 1. Every person who shall have been or shall be hereafter, dispossessed or ejected from, or out of, any piece, parcel, lot, or tract of land, by the judgment, decree, or process, of any Court of competent jurisdiction, and who, not having legal right so to do, shall reenter into, or upon, or take possession of, any such land, or any part thereof, or induce, or procure, any person not having legal right so to do, or shall aid or abet him therein, shall be deemed guilty of a contempt of the Court by which such judgment or decree was rendered, or from which such process issued, and shall be tried and punished therefor, in the same manner and form as now provided by law, in case of contempt not committed in presence of the Court or Justice of the Peace.

SEC. 2. Upon a conviction for such contempt, the Court or Justice of the Peace shall immediately issue an alias process, directed to the proper officer, and requiring him to restore the party entitled to the possession of such property, under the original judgment, decree, or process, to such possession of which he shall have been dispossessed by the wrongful conduct or act herein declared to be a contempt.

disturbance in presence of the Court or its immediate vicinity, tending to interrupt the due course of a trial, or other judicial proceeding ;

3d. Disobedience or resistance to any lawful writ, order, rule, or process, issued by the Court or Judge, at chambers ;

4th. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness ;

5th. Rescuing any person or property in the custody of any officer, by virtue of an order of process of such Court or Judge at chambers.

1. Contempt is defined by the statute to be the disobedience or resistance of a lawful order of the Court or Judge; and if a Court having jurisdiction should issue an erroneous order, a disobedience of it is a contempt. *Ex parte Cohen et al.*, 5 Cal. 494.

2. Where an order was made by the District Court of the eighth judicial district, whereby A. was ordered to be imprisoned forty-eight hours and fined five hundred dollars for contempt of Court, without setting forth any of the facts whereon the order was based: *Held*, that a *certiorari* should issue to remove the proceedings for review into this Court; and *held, further*, that a *mandamus* was not a proper remedy in such case. *People v. Turner*, 1 Cal. 152.

3. Where an order of the District Court, fining and imprisoning for contempt, does not specify on its face wherein the contempt existed, it will be reversed on *certiorari*. *Ex parte Field*, 1 Cal. 187.

4. It is the right and duty of the Supreme Court, on *habeas corpus*, to review the decisions of inferior Courts, in cases of contempt, as well as in others. *Ex parte Rowe*, 7 Cal. 181.

5. A commitment for contempt for refusing to obey an unlawful order of Court, can be reviewed and set aside by a superior Court. *Id.*

6. In suit for divorce the Court has power to order the husband to pay money to the wife for her support during the litigation, and for counsel fees and other legal expenses; and such order may be enforced by imprisonment for contempt in case of refusal to pay. *Ex parte Perkins*, 18 Cal. 60.

7. Where, in the regular course of judicial proceedings before a Court of general jurisdiction, a party having notice of the proceedings has been ordered by the judgment to pay a certain sum of money, and in default of obedience to the order has been committed for contempt, he cannot, on application to the Supreme Court for a writ of *habeas corpus*, question the *regularity* of the facts; the power of the Court below to make the order is the only question. *Id.*

8. As to the regularity of the proceedings, and the propriety of the order, the Supreme Court is not an appellate Court, but a Court of original special jurisdiction, to discharge the applicant, when no legal cause of detention exists. *Id.*

9. District Courts have jurisdiction to punish for contempt persons who re-enter upon a tract of land, after having been dispossessed therefrom by a judgment and process of a Court of competent jurisdiction. *People v. Duinelle*, 29 Cal. 632.

10. The Act of 1862, for the punishment of contempts committed by re-entering on land after having been dispossessed by judgment and process of a Court, was designed not only to protect the Court from contempt of its authority, but to give a party injured an additional remedy in the action for the restoration of what he was entitled to by the judgment. *Id.*

11. Contempt, violation of an injunction.—The District Court alone has jurisdiction to try and punish for a contempt for the violation of an injunction issued out of the District Court. *People v. County Judge of Placer Co.*, 27 Cal. 151.

§ 481. A contempt committed in the presence of the Court may

be punished summarily; when not so committed, an affidavit or statement shall be made.

When a contempt is committed in the immediate view and presence of the Court, or Judge at Chambers, it may be punished summarily; for which an order shall be made reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the Court, or Judge at Chambers, an affidavit shall be presented to the Court or Judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators.

Abb. Forms, 1886.

1. An order of Court adjudging a party guilty of contempt, should always show upon its face the facts upon which the exercise of the power is based, and the adjudication is made. *The People v. Turner*, 1 Cal. 152.

2. Whenever an order of the District Court, fining and imprisoning for contempt, does not specify on its face wherein the contempt consisted, it will be reversed on *certiorari*. *Ex parte Field*, Id. 187.

3. Every Court has, while engaged in the performance of its lawful functions, as an incident to its judicial character, the authority to preserve order, decency and silence in its presence; and in such case may apprehend and punish an offender without further examination or proof; but where the offense is committed out of Court, the party is entitled to a notice and a hearing in his defense. *Id.*

4. An attachment will not be issued against a District Judge for non-compliance with a writ of *mandamus*, by which he was directed to vacate an order expelling the relator from the bar, and reinstate him in his office of attorney, when it does not appear from the papers on which the motion for the attachment is founded that any application has been made to the Court to vacate the order as commanded by the writ of *mandamus*, and where it appears that, so far as the action of the Judge in vacation is concerned, he has in substance complied with the command of the writ of *mandamus*; and in such case, it will not be deemed a disobedience of the writ, that the Court has again expelled the relator for reasons alleged to have arisen after the issuing of the writ. *Id.* 188.

5. The district Courts have jurisdiction to punish for contempts of their process, and to such writs as are necessary to the exercise of that jurisdiction. *Ex parte Cohen et al.*, 5 Cal. 494.

6. A party committed for refusing to answer questions propounded to him as a witness, under an order that he stand committed till he answer the questions, will be discharged on *habeas corpus*, where it appears that the suit has abated; there being no longer parties or subject matter before the Court, there is no longer a case in which the questions can be asked. *Ex parte Rowe*, 7 Cal. 175.

7. It seems that the refractory witness might still be reached by attachment for the contempt, and by a judgment thereon. *Id.*

8. A statement that R. was committed for contempt in refusing to answer certain questions propounded to him by the grand jury, is not a compliance with the section. The question asked should be set out. *Id.* 181.

9. A commitment for contempt in refusing to answer certain questions propounded to the witness by the grand jury, "is not a compliance with the statute, which requires that when the contempt consists in the omission to do

an act which it was in the power of the person to perform, the act shall be specified in the commitment." It does not appear from such commitment whether the questions were legal or not. *Id.*

10. In such a case, the commitment should state that the grand jury were inquiring into a certain question, stating it; that the prisoner was sworn as a witness, and certain questions asked him, stating them; that he refused to answer; that the facts were thereupon presented to the Court by the grand jury, and the prisoner required by the Court to answer, which being refused by the prisoner, he was committed for contempt. And this rule is based upon the power of an appellate Court to review, on *habeas corpus*, the proceedings of an inferior in cases of contempt. *Id.*

§ 482. *A warrant of attachment may issue, or a notice to show cause.*

When the contempt is not committed in the immediate view and presence of the Court or Judge, a warrant of attachment may be issued to bring the person charged to answer, or without a previous arrest, a warrant of commitment may upon notice, or upon an order to show cause, be granted; and no warrant of commitment shall be issued without such previous attachment to answer, or such notice or order to show cause.

§ 483. *¹Bail may be given by a person arrested under such warrant.*

Whenever a warrant of attachment is issued pursuant to this chapter, the Court or Judge shall direct by an endorsement on such warrant, that the person charged may be let to bail for his appearance, in an amount to be specified in such endorsement.

¹ Amended stat. 1859, 160.

§ 484. *Sheriff shall, upon executing the warrant, arrest and detain the person until discharged.*

Upon executing the warrant of attachment, the Sheriff shall keep the person in custody, bring him before the Court or Judge, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next section.

§ 485. *Bail bond, form and conditions of.*

When a direction to let the person arrested to bail is contained in the warrant, of attachment, or endorsed thereon, he shall be discharged from the arrest, upon executing and de-

livering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant and abide the order of the Court or Judge thereupon; or they will pay as may be directed, the sum specified in the warrant.

§ 486. *Officer shall return warrant and bail bond, if any.*

The officer shall return the warrant of arrest and undertaking, if any, received by him from the person arrested, by the return day specified therein.

§ 487. *Hearing.*

When the person arrested has been brought up or appeared, the Court or Judge shall proceed to investigate the charge and shall hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary.

§ 488. *Judgment and penalty if guilty.*

Upon the answer and evidence taken, the Court or Judge shall determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both.

§ 489. *If the contempt is the omission to perform any act, the person may be imprisoned until performance.*

When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act shall be specified in the warrant of commitment.

§ 490. *Persons in contempt may also be indicted, if an indictable offense.*

Persons proceeded against according to the provisions of this chapter, shall also be liable to indictment for the same misconduct, if it be an indictable offense; but the Court before which a conviction is had on the indictment, in passing

sentence, shall take into consideration the punishment before inflicted.

§ 491. *If a party fail to appear, proceedings.*

When the warrant of arrest has been returned served, if the person arrested do not appear on the return day, the Court or Judge may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, the measure of damages in the action shall be the extent of the loss or injury sustained by the aggrieved party, by reason of the misconduct for which the warrant was issued, and the costs of the proceeding.

§ 492. *Illness sufficient excuse for nonappearance of party arrested. Confinement under arrests for contempt.*

Whenever, by the provisions of this chapter an officer is required to keep a person arrested on a warrant of attachment in custody, and to bring him before a Court or Judge, the inability from illness or otherwise of the person to attend shall be a sufficient excuse for not bringing him up; and the officer shall not confine a person arrested upon the warrant in a prison or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

§ 493. *Judgments and orders in such cases final. Extent of punishment.*

The judgment and orders of the Court or Judge, made in cases of contempt, shall be final and conclusive. The punishment shall be by fine or imprisonment, but no fine shall exceed the sum of five hundred dollars, and no imprisonment shall exceed the period of five days, except as provided in section four hundred and eighty-nine.

1. The judgments and orders of Courts or Judges on the subjects of contempts, are by our statutes declared to be final and conclusive. Under the writ of *habeas corpus*, this Court cannot review the orders of another Court in such cases. *Ex parte Cohen et al.*, 5 Cal. 494.

2. The law regards the substance more than the form, and where the proceeding, though in form a case of contempt, is in substance a private right, the appellate Court will compel the Court below to issue an attachment to punish a contempt. *Merced Mining Co. v. Fremont*, 7 Cal. 130.

3. Per BURNETT, J. Every Court empowered to punish for contempt is not the sole and final Judge in all cases of alleged contempt. *Ex parte Rowe*, 7 Cal. 175.

TITLE LI.

OF COSTS.

- SECTION 494. Compensation of attorneys. Prevailing party shall be allowed costs.
495. Plaintiff's costs shall be allowed, of course, upon judgment in his favor in certain cases.
496. Several actions, brought on a single cause of action, shall carry costs in but one.
497. Defendant's costs shall be allowed, of course, in certain cases.
498. Costs in actions not mentioned in section four hundred and ninety-five. Costs not allowed when recovery is less than two hundred dollars.
499. When the several defendants are not united in interest, costs may be reversed.
500. Costs discretionary with the Court in certain cases.
501. Repealed.
502. Repealed.
503. Repealed.
504. Referee's fees.
505. Continuance; costs may be imposed as a condition of.
506. Costs when a tender is made before suit is brought.
507. Costs in actions by, or against an administrator, etc.
508. Costs in a review, other than by appeal.
509. Costs paid on the commencement of an action.
510. Filing of an affidavit to bills of costs.
511. Interest and costs shall be included by the clerk in the judgment.
512. Where plaintiff is a non-resident, or foreign corporation, defendant may require security for costs.
513. Justification of sureties on undertaking for costs.
514. If such security be not given, the action may be dismissed.

§ 494. ¹*Compensation of attorneys. Prevailing party shall be allowed costs.*

The measure and mode of compensation of attorneys and counselors shall be left to the agreement, express or implied, of the parties; but there shall be allowed to the prevailing party in any action in the Supreme Court, District Court, Superior Court of the city of San Francisco, and County Court, his costs and necessary disbursements in the action, or special proceeding in the nature of an action.

Amended 1853, 277; 1855, 250. N. Y. Code § 303.

1. **Generally.**—An attorney has no lien upon a judgment recovered by him in favor of his client for a *quantum meruit* compensation for his services. Such lien extends only to costs given by statute. *Ex parte Kyle*, 1 Cal. 331.

2. Before suit brought the plaintiffs agreed with their attorneys that if the latter brought this action and recovered, they should have one third of the judgment and the costs as compensation. After judgment and execution

issued, the plaintiffs compromised with defendant for less than the amount of the judgment, and entered satisfaction upon the record. *Held*, that the attorneys had no lien upon the judgment, and could not disturb the satisfaction entered by the plaintiffs. *Mansfield v. Dorland*, 2 Cal. 507.

3. A lien of the attorney for his costs was settled by this Court in *ex parte Kyle* (1 Cal. R. 331) and *Mansfield v. Dorland* (2 Cal. 507), and not allowed. *Russell v. Conway*, 11 Cal. 103.

4. It being for the interest of all parties concerned, that the company should be legally dissolved: *Held*, that the costs and a counsel fee, on each side, should be paid out of the fund. *Von Schmidt v. Huntington*, 1 Cal. 55.

5. A mortgage contained a stipulation for all the costs of foreclosure, including counsel fees, not exceeding five per cent. of the amount due. *Held*, that the limitation of five per cent. is intended to apply to counsel fees alone, and that the complainant would be entitled to recover the whole of his costs by operation of the statute and independent of any stipulation. *Gronfier v. Minturn & al.*, 5 Cal. 492.

6. Where costs are imposed as condition for re-opening a case after the adjournment of the term, the acceptance of the costs of the opposite party will not be construed into a consent to have the cause reinstated. *Carpenter v. Hart*, 11 Cal. 406.

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Clerk of the Supreme Court, in entering up the judgment, adds the words "with costs," and annexes to the *remittitur* a copy of the bill of costs. These words are a sufficient awarding of costs for the clerk below to issue execution. *Id.*

Where a judgment is against two, one only of whom appeals, and the appellant is dismissed with twenty per cent. damages, the damages with the costs become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. The clerk may can issue execution for these damages and costs. *McMillan v. Fischer*, 11 Cal. 241.

The notices and affidavits filed on application to retax costs were not embodied in a bill of exceptions or statement: *Held*, that the judgment must be affirmed, upon the presumption that the Court below decided properly upon the evidence before it. *Gates v. Buckingham*, 4 Cal. 286.

16. If the plaintiff in ejectment recovers judgment he is entitled to the costs, although his recovery is for only a portion of the demanded premises, and the defendant recovers judgment for the residue. *Haven v. Dale*, 30 Cal. 547.

17. When a judgment for plaintiff is refused by the appellate Court, and a new trial is awarded, if plaintiff recovers judgment on the second trial, he is entitled to his costs in the Court below incurred on the first trial. *Stoddard v. Treadwell*, 29 Cal. 281.

18. Possibly as the entry of such several judgments increases the costs, it would be ground for re-taxing or apportioning them. *Lick v. Stockdale*, 18 Cal. 219.

19. Allowance of costs in many cases discretionary.—The allowance of costs rests in the discretion of the Court of original jurisdiction. And where, on sustaining a demurrer to a complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, the Court gave judgment for the defendant for full costs, including a jury fee. *Held*, no such abuse of discretion as to warrant interference by the Supreme Court. *Harvey v. Chilton*, 11 Cal. 119.

20. The Supreme Court will only review the ruling of an inferior Court in the matter of costs upon an appeal from the judgment in the case. *Votan v. Reese*, 20 Cal. 90.

§ 495. *Plaintiff's costs shall be allowed, of course, upon judgment in his favor in certain cases.* (1) (2) (3).

Costs shall be allowed of course to the plaintiff upon a judgment in his favor in the following cases :

- 1st. In an action for the recovery of real property ;
- 2d. In an action to recover the possession of personal property, when the value of the property amounts to three hundred dollars or over. Such value shall be determined by the jury, Court, or referee, by whom the action is tried ;
- 3d. In an action for the recovery of money or damages, where plaintiff recovers three hundred dollars or over ;
- 4th. In a special proceeding in the nature of an action.

¹ Amended 1853, 277; 1865-6, 847. See § 255. N. Y. Code, § 304.

1. First subdivision.—In an action to try the right of the use of water, and for damages for diverting it, where the amount for which judgment is given is less than two hundred dollars, it will carry costs. *Marius v. Bicknell*, 10 Cal. 217.

¹STATUTES OF 1858, PAGE 232, § 7.—Applicable to the City and County of San Francisco only.

SECTION 7.—The prevailing party shall be allowed five per cent. on the amount recovered, together with any sum by him so paid in a cause as costs and disbursements, to be included in the judgment against the adverse party ; provided, said five per cent. shall be allowed only in litigated cases ; and provided further, that said percentage shall not be allowed to exceed the sum of one hundred dollars on any one judgment.

²STATUTES OF 1853, PAGE 160.

SECTION 1.—All costs which have or may hereafter accrue in cases where the State is a party to any action in any of the Courts of this State, and wherein the State, according to law, is liable, shall be paid out of any funds in the State treasury not otherwise appropriated.

(3) STATUTE 1867-8, 363, Sec. 13.

* * Plaintiff shall recover the sum of fifteen dollars, in addition to the taxable cost, as attorney's fees ; provided, he shall waive the per centage on recovery as provided by law.

* * [This applies to suits brought to recover street assessments in San Francisco county.]

2. In an action of ejectment, where the plaintiff recovers part of the premises in suit, he is entitled to his costs. In such a case, the allowance of costs is not discretionary with the District Judge. *Haven v. Dale and wife*, Oct. T. 1866.

3. **Second subdivision.**—A defendant in replevin who recovers judgment, the jury failing to find the value of the property to exceed two hundred dollars, is nevertheless entitled to his costs, where the plaintiff's complaint states its value at a sum exceeding that amount. *Edgar v. Gray*, 5 Cal. 267.

4. In an action to recover possession of personal property, if the plaintiff takes the property at the commencement of the action, and the defendant prays a return of it, and the defendant was entitled to the property at the commencement of the action, but his right has seized and rested in the plaintiff before trial, the judgment should leave the property in plaintiff's possession, but award costs to defendant. *O'Conner v. Blake*, 29 Cal. 312.

5. **Third subdivision.**—The plaintiff can only be allowed costs when he recovers two hundred dollars in an action for money or damages. Costs are incident to the judgment, and cannot be given by the jury by way of damages. *Shay v. Tuolumne Water Co.*, 6 Cal. 286.

6. Costs of a suit form no part of the matter in dispute, and an appeal does not lie to the Supreme Court, where the amount involved is less than two hundred dollars, although the costs added thereto may increase it beyond that sum. *Dumphy v. Guindon*, 13 Cal. 30, overruling *Gordon v. Ross*, 2 Cal. 157; see *Zabriskie v. Torrey*, 20 Cal. 174, and *Meeker v. Harris*, 23 Id. 286.

7. In an action for the recovery of money or damages, the prevailing party is entitled to his costs, and the Court has no discretion in awarding them. *Stoddard v. Treadwell*, 29 Cal. 281.

§ 496. *Several actions brought on a single cause of action shall carry costs in but one.*

When several actions are brought on one bond, undertaking, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs shall be allowed to the plaintiff in more than one of such actions, which may be at his election, if the party proceeded against in the other actions were, at the commencement of the previous action openly within this State; but the disbursements of the plaintiff shall be allowed to him in each section [action].

N. Y. Code, § 304.

1. Where an action has been commenced against several defendants, and there has been a judgment in their favor, they are not all entitled to recover separate costs to the amount allowed by the act, but can only recover jointly, as though there had been but one defendant. *Rice v. Leonard et al.*, 5 Cal. 61.

2. Possibly as the entry of such several judgments in ejectment increases the costs, it would be ground for retaxing or apportioning them. *Lick v. Stockdale*, 18 Cal. 219.

See post, § 495.

§ 497. *Defendant's costs shall be allowed, of course, in certain cases.*

Costs shall be allowed of course to the defendant upon a judgment in his favor in the actions mentioned in section four hundred and ninety-five, and in a special proceeding in the nature of an action.

N. Y. Code, § 305.

§ 498. *Costs in actions not mentioned in section four hundred and ninety-five; costs not allowed, if recovery is less than two hundred dollars.*

In other actions than those mentioned in section four hundred and ninety-five, costs may be allowed or not; and if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the Court; but no costs shall be allowed in an action for the recovery of money or damages when the plaintiff recovers less than three hundred dollars, nor in an action to recover the possession of personal property, when the value of the property is less than three hundred dollars.

¹ Amended 1865-6, 847. N. Y. Code, § 306.

1. Costs in equity are always in the discretion of the Court, and whether granted or withheld, are but as incidents to and no part of the relief sought. *Gray v. Dougherty et al.*, 25 Cal. 282.

2. In an action for damages, where the jury found a verdict for plaintiff for fifty dollars and costs: *Held*, that judgment could not be entered for costs in favor of plaintiff. *Shay v. Tuolumne Water Co.*, 6 Cal. 286.

3. The plaintiff can only be allowed costs when he recovers two hundred dollars, in an action for money or damage. Costs are incident to the judgment, and cannot be given by the jury by way of damages. *Id.*

4. The position of the appellant is that the jury, having found that the ditch was not a nuisance, the case is to be regarded, so far as the costs are concerned, as a simple action for damages for injuries to the property of the plaintiff. If this position be correct, no costs were taxable to either party under the statute, the damages recovered being less than two hundred dollars. *Vutan v. Reese*, 20 Cal. 90.

5. In this case suit for damages to a mining claim and for an injunction, plaintiffs had judgment for one hundred dollars and costs, taxed at \$—, a perpetual injunction being granted also. After the judgment was entered, plaintiffs moved that costs for the trial be allowed. Motion denied, except as to the costs accrued by reason of the injunction granted. *Held*, that this is a case where the allowance of costs is in the discretion of the Court below. *Emond v. Chew et al.*, 17 Cal. 336.

§ 499. *When the several defendants are not united in interest, costs may be severed.*

When there are several defendants in the actions mentioned in section four hundred and ninety-five, not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the

Court shall award costs to such of the defendants as have judgment in their favor.

N. Y. Code, § 306.

§ 500. *Costs discretionary with the Court in certain cases.*

In the following cases the costs of an appeal shall be in the discretion of the Court:

1st. When a new trial is ordered;

2d. When a judgment is modified.

N. Y. Code, § 306.

1. Where a judgment was affirmed in part and reversed in part, the respondent was allowed his costs in the Court below, but was required to pay the costs of the appeal. *Cole v. Swanston*, 1 Cal. 51.

2. The costs on appeal, or, properly, the costs in this Court, and the cost of making up the appeal in the Court below, including the costs of making out the transcript and the costs of the former trial, abide the event of the suit. *Gray v. Gray* and *Eaton v. Palmer*, 11 Cal. 341.

3. Where the judgment below is reversed on appeal, and a new trial had, the costs of the first trial are part of the final bill of costs. *Vischer v. Webster*, 13 Cal. 58.

4. The judgment in this case being for too much interest, was modified by the Supreme Court in that particular, and then permitted to stand at appellant's costs, on the principle that where the Supreme Court modifies the judgment below for an apparent error, which appellant might have had corrected below, on motion, respondent will not be taxed with costs. *Cassin v. Marshall*, 18 Cal. 689.

5. Appellant made to pay costs, although the judgment is reversed. *Ranif v. Cynthia*, 18 Cal. 669.

6. Judgment may be affirmed as to a *mandamus*, but reversed as to costs. *McDougall v. Roman*, 2 Cal. 80.

7. Where in ejectment the facts found by the Court authorized a judgment for possession, but not for damages, the judgment being for possession and damages, was affirmed in the Supreme Court, upon respondent's remitting the damages and paying the costs of appeal. *Doll v. Feller*, 16 Cal. 433.

8. Case where each party was made to pay his own costs on appeal. *Bradbury v. Barnes*, 19 Cal. 120.

9. Case where costs of motion in Supreme Court were not allowed. *Swain v. Naglee*, 19 Cal. 127.

10. Case where appellant paid costs in Supreme Court. *Jungerman v. Bovee*, 19 Cal. 354.

11. Where a judgment of the Court was incorrect in part, the appellate Court ordered the Court below to modify its judgment accordingly, and the appellants recovered the costs of their appeal. *Welch v. Sullivan*, 8 Cal. 512.

12. If no motion be made in the Court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the Supreme Court at appellant's cost. *Tryon v. Sutton*, 13 Cal. 491.

13. If any one or more of the parties desire a modification of the judgment as to costs, the proper application should have been made within the ten days allowed for filing a petition for a rehearing. *Gray v. Gray*, 11 Cal. 341.

14. Defendants below and appellants here, on the main question, to wit: the injunction, required to pay costs in this Court on both appeals. *Jungerman v. Bovee*, 19 Cal. 355.

15. Where a case is remanded for further proceedings, and costs awarded in this Court in general terms, the costs on appeal only are included, leaving the costs of the former trial to abide the event of the suit. *Gray v. Gray*, 11 Cal. 341, and *ex parte Burrell*, 24 Cal. 350.

16. See *post*, § 665, as to execution for costs on filing the remittitur.

17. The party responsible for erroneous proceedings after the *remittitur* has been sent down from the Supreme Court, must pay the costs of those proceedings, and the costs consequent on a second appeal caused by them. *Argenti v. City of San Francisco*, 30 Cal. 458.

17. When a judgment is reversed by the Supreme Court, and the case remanded for further proceedings, and costs are awarded in general terms, the costs awarded include only the costs made on the appeal to the Supreme Court, the costs of the former trial abide the event of the suit. *Ex parte Burdell et al.*, 24 Cal. 350.

18. If the printed transcript in the Supreme Court is unnecessarily long, the party responsible for this will be adjudged to pay the costs of printing thus unnecessarily incurred. *People v. Holden*, 28 Cal. 129.

§ 501. Amended 1853, 278; repealed 1855, 250.

§ 502. Amended 1853, 250; repealed 1855, 250.

§ 503. Amended 1853, 250; repealed 1855, 250.

§ 504. *Referees' fees.*

The fees of referees shall be five dollars to each for every day spent in the business of the reference; but the parties may agree in writing, upon any other rate of compensation, and thereupon such rate shall be allowed.

§ 505. ¹*Continuance, costs may be imposed as condition of.*

When an application is made to a Court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the Court or referee, as a condition of granting the same.

¹Amended 1855, 251.

§ 506. *Costs when a tender is made before suit brought.*

When in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in Court for the plaintiff the amount so tendered, and the allegation be found to be true, the plaintiff shall not recover costs, but shall pay costs to the defendant.

1. A tender does not extinguish or satisfy the obligation, and an offer to comply with the commands of a judgment does not amount to a satisfaction thereof. *Reddington v. Chase*, Jan. T. 1868.

2. Where a tender is made of the full amount due before suit is brought, and the tender is kept good and brought into Court, the judgment should be for plaintiff for the amount tendered, and for defendant for his costs. *Curtis v. Abadie et al.*, 25 Cal. 502.

§ 507. *Costs in action by or against an administrator, etc.*

In an action prosecuted or defended by an executor, administrator, trustee, of express trust, or a person expressly authorized by statute, costs may be recovered as in action by and against a person prosecuting or defending in his own right; but such costs shall, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the Court shall direct the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defense.

N. Y. Code, § 317.

1. Executors and administrators are individually responsible for costs recovered against them in every case; but they shall be allowed them in their administration accounts, except when it appears that the action has been prosecuted or resisted without just cause. *Hicox v. Graham*, 6 Cal. 169.

§ 508. *Costs in a review other than by appeal.*

When the decision of a Court of inferior jurisdiction in a special proceeding is brought before a Court of higher jurisdiction for a review in any other way than by appeal, the same costs shall be allowed as in cases on appeal, and may be collected by execution, or in such manner as the Court may direct, according to the nature of the case.

§ 509. *¹Costs paid on the commencement of an action.*

On the commencement of an action, the plaintiff, and on the filing of notice of appeal from final judgment the appellant, shall pay to the Clerk three dollars, to be applied to the payment of the salary of the Judge of the Court in which the payment is made. Each Clerk shall keep a true and accurate account of all moneys so received, and shall pay over the same at the end of each month to the Judge of such Court, taking duplicate receipts for each payment, one of which shall be filed by the said Clerk in his office. On the first day of each month, the said Clerk shall deliver to the Auditor of the county an account of all sums received, specifying the cases in which received, and of all sums paid out. At the same time, a like account shall be made out and forwarded by such Clerk to the Controller of State of the sums paid into the District Court, and of the sums paid out, with the other receipts of said Judge therefor. It shall be the duty of the District Attorney, at the com-

mencement of each month, to examine the books of said Clerk, and if found correct, in the amount paid to the District Judge, he shall make and execute a certificate to such Controller to that effect; and if said books shall be found correct in the amount paid to the County Judge, the said District Attorney shall in like manner make and execute a certificate to the County Auditor to that effect. In paying the salary of any District Judge, the Controller shall deduct the amount paid to such Judge, as shown by his receipt; and in like manner the County Auditor, in paying the salary of any County Judge, shall deduct the amount to such Judge as shown by his receipt.

¹Amended 1862, 88; 1863, 498.

§ 510. *Filing of, and affidavit to, bill of costs.*

The party in whose favor judgment is rendered, and who claims his costs, shall deliver to the Clerk of the Court, within two days after the verdict or decision of the Court, a memorandum of the items of his costs and necessary disbursements in the action of proceeding; which memorandum shall be verified by the oath of the party, or his attorney, stating that the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding.

¹Amended 1855, 251.

1. Where costs on appeal to the Supreme Court are not entered on the judgment docket in the Court below, they do not become a lien on property until the levy of an execution. *Chapin v. Broder*, 16 Cal. 403.

2. The New York cases do not apply, because there, costs are taxed by the clerk, on notice to the adverse party; but no time is fixed within which the notice must be given, and the costs are not waived by failure to give it. *Id.*

3. Under the Practice Act, as it stood in 1854, a party who failed to file with the clerk a memorandum of costs within the time limited, waived his right to costs, whether they were clerk's and sheriff's fees or other costs. *Id.*

4. If the clerk's and sheriff's fees were inserted in the judgment, when not so claimed, the judgment is so far a nullity, and may be attacked collaterally. *Id.*

5. Section five hundred and ten of the code, which provides that the party who obtains a judgment shall, within ten days after the verdict or judgment, file with the clerk his bill of costs, does not apply to costs on appeal to the Supreme Court. *Gray v. Gray*, 11 Cal. 341.

6. Where the original bill of costs is filed within the time prescribed by the act, an amendment allowed after the time relates back to the time of filing the original of which it forms merely a part. *Burnham v. Hays*, 3 Cal. 115.

7. The affidavit by the attorney of the party accompanying the bill of costs is good under the statute. *Id.*

8. If the original affidavit was a nullity, the defendant [should have taken proper steps to set it aside, or have appealed from the judgment, on the ground that the costs had been waived by operation of the statute. *Id.*

9. For amendment or retaxation of costs, see *Id.*

10. A memorandum of the costs of filing notice and undertaking on appeal, and preparing the transcript for the Supreme Court, should be filed in the office of the clerk of the Court below at the time of filing the remittitur there, or within the time hereafter prescribed by the statute in other cases. *Ex parte Burrill et al.*, 24 Cal. 350.

11. If the Court adds to the judgment the costs of the prevailing party after the time for filing the same has expired, and after an appeal has been perfected the error can only be corrected by an appeal from the order. *Jones v. Fred.*, 28 Cal. 245.

12. A failure by the opposing party to file his cost bill, or to give notice under a rule of Court allowing five days after notice for payment of the costs, would not operate to make the vacation of the judgment absolute. *Gregory v. Haynes.* 21 Cal. 443.

13. If items are included in the bill of costs which are not properly taxable, it affords no just ground for refusing to issue an execution or recalling one, but the remedy is by motion to re-tax. *Meeker v. Harris.* 23 Cal. 285.

§ 511. ¹*Interest and costs shall be included by the Clerk in the judgment.*

The Clerk shall include in the judgment entered up by him, any interest on the verdict, or decision of the Court, from the time it was rendered, or made, and the costs, if the same have been taxed, or ascertained; and he shall, within two days after the same shall be taxed, or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose, and shall make a similar insertion of the costs in the copies and docket of the judgment.

¹Amended, 1861, 494. N. Y. Code, § 310.

1. After a judgment is entered and the record completed, the clerk has no power to fill up the blank left for costs. His authority terminates with the entry of the judgment, and the Court alone, on motion to amend, is competent to relieve where costs are omitted. *Chapin v. Broder.* 16 Cal. 403.

2. The interest due forms a part of the amount in dispute, and where the principal sum for which judgment is recovered is less than two hundred dollars, if the interest added swells the judgment to more than two hundred dollars, the Supreme Court has jurisdiction. *Skilman v. Lachman.* 23 Cal. 199.

3. Without any express contract in writing, made by the testator, providing for a higher rate of interest than ten per cent. per annum, the executors have no authority to consent to the entry of a judgment bearing a greater rate of interest than ten per cent. per annum; and if they do so, they should be charged with the excess of interest in their final account. *Matter of estate of Isaacs.* 30 Cal. 105.

4. A judgment can properly bear interest only from the time it is pronounced. Interest due, on demand, on which the action is brought, should be included in the judgment when entered. *Bipend v. L. and L. F. and L. Ins. Co.*, 30 Cal. 78.

5. Where a judgment is reversed by the Supreme Court, and the case remanded for further proceedings, and costs are awarded in general terms, the costs awarded include only the costs made on the appeal to the Supreme Court. The costs of the former trial abide the event of the suit. *Ex parte Burrill et al.*, 24 Cal. 350.

6. The clerk of the Court below can issue an execution, if required by the prevailing party, for the costs included in the memorandum and the costs of the clerk of the Supreme Court, as certified by him or the remittitur. *Id.*

7. Costs are included in and constitute a part of the judgment, and hence, though ascertained and adjudged by the Court after an entry of the judgment by the clerk may have been made, yet the law considers such action of the Court as having preceded the final judgment. *Lasky v. Davis*, Oct. T. 1867.

§ 512. *Where plaintiff is a non-resident, or foreign corporation, defendant may require security for costs.*

When the plaintiff in an action resides out of the State, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action shall be stayed until an undertaking, executed by two or more persons, be filed with the Clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the Court or Judge upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking be executed and filed.

N. Y. Code, § 303.

1. Where defendant, December 19th, under sections five hundred and twelve and five hundred and fourteen of the Practice Act, served on plaintiff, a non-resident, notice to give security for costs, the notice not being accompanied with an order staying proceedings, and on the next day judgment was rendered for defendant, and plaintiff appealed to the Supreme Court: *Held*, on motion to dismiss the appeal, that, after judgment, it was too late to move to dismiss the action; that the undertaking on appeal is sufficient security for costs subsequently incurred, and that the motion must be denied. *Comstock v. Clemens*, 19 Cal. 77.

§ 513. *Justification of sureties on undertaking for costs.*

Each of the sureties on the undertaking mentioned in the last section shall annex to the same an affidavit that he is a resident and householder or freeholder within the county, and is worth double the amount specified in the undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

§ 514. *If such security be not given, the action may be dismissed.*

After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the Court or Judge may order the action to be dismissed.

TITLE LII.

OF MOTIONS, ORDERS, NOTICES, SERVICE OF PAPERS, AND MISCELLANEOUS PROVISIONS.

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§ 515. *Order and motion, defined.*

Every direction of a Court or Judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.

N. Y. Code, § 400.

1. An application for an order is a motion. *Jenkins v. Frink*, 37 Cal. 399.
2. When the statute speaks of notice of a motion, it means written notice, or notice in open Court, of which a minute is made by the clerk. *Borland v. Thornton*, 12 Cal. 440.
3. Against a motion there seems to be no statute of limitations, and it may be made when there is no unreasonable delay. *Reynolds v. Harris*, 14 Cal. 668.
4. Where a party in his notice of motion, served on the adverse party, asks

for a specific relief, or for such other or further order as may be just, the Court may afford any relief compatible with the facts of the case presented. *The People v. Turner*, 1 Cal. 152.

§ 516. *Motions, where to be made.*

Motions shall be made in the county in which the action is brought, or in an adjoining county in the same district.

N. Y. Code, § 401.

1. If the Judge who tried a cause goes to a county in his district not adjoining the one in which the case was tried, to hold Court, before the time for filing amendments to the statement on motion for a new trial has expired, the moving party prosecutes the motion with due diligence, if he brings the same to a hearing when the Judge returns or first holds Court in a county adjoining the one in which the case was tried. *Warden v. Mendocino County*, 32 Cal. 656.

§ 517. *Notice of motion, at what time to be given.*

When a written notice of a motion is necessary, it shall be given, if the Court be held in the same district with both parties five days before the time appointed for the hearing; otherwise ten days, but the Court, or Judge, or County Judge may prescribe a shorter time.

N. Y. Code, § 402. Amended 1853, 278.

1. The Court has it always in its power, in the exercise of a proper discretion, to extend the time fixed by law for filing papers in a cause. *Wood v. Forbes*, 5 Id. 62.

2. If there is any ambiguity in the terms of a notice, rendering its meaning doubtful, the construction must be most strongly against the party giving the notice. *Carpentier v. Thurston*, 30 Cal. 123.

3. Notice of an application by plaintiff for an injunction must be given for the length of time presented by section five hundred and seventeen of the Practice Act. If given for a shorter time, and defendant does not appear, he may treat an injunction thus obtained as granted without notice, and move to dissolve the same under section one hundred and eighteen. *Johnson v. Wide West Mining Co.*, 22 Cal. 479.

§ 518. *Transfer of motions, and orders to show cause.*

When a notice of motion is given, or an order to show cause is made returnable before a Judge out of Court, and at the time fixed for the motion, or on the return day of the order, the Judge is unable to hear the parties, the matter may be transferred by his order to some other Judge, before whom it might originally have been brought.

N. Y. Code, § 404.

§ 519. *Provisions of this title not applicable to original or final process.*

Written notices and other papers, when required to be served on the party or attorney, shall be served in the man-

ner prescribed in the next three sections, when not otherwise provided; but nothing in this title shall be applicable to original or final process, or any proceedings to bring a party into contempt.

§ 520. *Service of notice of motion, when personal or otherwise.*

The service may be personal, by delivery to the party or attorney, on whom the service is required to be made, or it may be as follows:

1st. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his Clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open, so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelope, into the post office, directed to such attorney;

2d. If upon a party, it may be made by leaving the notice or other paper at his residence between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; and if his residence be not known, by putting the same, enclosed in an envelope, into the post office, directed to such party.

N. Y. Code, § 409.

1. Where a party changes his attorney in an action, and there is no regular substitution of attorneys as pointed out by statute, notices may be served on the attorney of record. *Grant v. White*, 6 Cal. 55.

2. An acknowledgment of service endorsed on a notice of appeal, as follows: "Due service of a copy of the within notice is hereby accepted to have been made this twentieth day of February, 1863," is no waiver of an objection that service upon the day mentioned is too late. *Twedy v. Ellis*, 22 Cal. 650.

3. A statement on the back of a notice of the motion for a new trial, signed by the attorney of the moving party, stating that the notice was served at a certain time, is not evidence of such service. *Calderwood v. Brooks*, 28 Cal. 151.

4. If the record does not show that the party resisting an application for new trial proposed any amendments to the statement, or participated in its settlement, it will be presumed that he waived service of notice. *Id.*

5. An affidavit of service of a notice of appeal on the respondent's attorney, if it does not show a personal service, must state that the notice was left in his office, with his clerk, or with a person having charge thereof, or that no person was in the office, and that the notice was left there in a conspicuous place, between the hours of eight in the morning and six in the afternoon. *Doll v. Smith*, 32 Cal. 475.

§ 521. *Service may be made by mail when persons reside in different places.*

Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail.

N. Y. Code, § 410.

1. A party relying upon a service of a notice by mail, must show a strict compliance with the provisions of the statute in making service. *People v. Alameda Township Co.*, 30 Cal. 182.

2. An affidavit of service of a notice of appeal by mail, must state that there is a regular communication by mail between the place of residence of the person making the service and the residence of the person upon whom it is to be served. *Id.*

3. An affidavit of service of notice of appeal by mail, under section five hundred and twenty-one of the Practice Act, must show that the person making the service resides in a different place from the person upon whom the service is made. *Moore v. Bess*, April T. 1868.

§ 522. *Manner of service by mail.*

In case of service by mail, the notice, or other paper, shall be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid. And in such case, the time of service shall be increased one day for every twenty-five miles distance, between the place of deposit and the place of address; provided, that service in any case shall be deemed complete at the end of ninety days from the date of its deposit in the post-office.

¹Amended 1861, 497.

1. When a legal notice is served by mail the distance which it travels is a question of fact to be determined by proof. *Neely v. Naglee*, 23 Cal. 152.

§ 523. *Appearance. Notices after appearance.*

A defendant shall be deemed to appear in an action when he answers, demurs, or gives the plaintiff a written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney shall be entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him, unless he be imprisoned for want of bail.

N. Y. Code, § 414., 35, 51; Abb. Forms 143, 146. See *ante* 28, 33.

1. Where the record shows, in general terms, the appearance of parties, the appearance will be confined to these parties served with process. *Chester v. Miller*, 13 Cal. 558.

2. The object of a summons is to bring the party into Court. If that object be obtained by the appearance and pleading of the party, he cannot complain. *Smith v. Curtis*, 7 Cal. 584.

3. When a defendant appears for the purpose of taking advantage of irregular summons by a motion to dismiss, it does not amount to a waiver of his rights so as to cure the defect. *Deidesheimer v. Brown*, 8 Cal. 339.

4. Nor does he waive his rights by answering after moving to dismiss, and motion overruled. *Id.*

5. Where the Court makes an order requiring plaintiff to appear at a certain time, and show cause why a judgment in his favor should not be set aside, and it does not appear that a copy of the order was served on plaintiff or his attorney, or that any notice was given of the time at which the matter was to be heard, it is error for the Court to set aside the judgment, and its order to that effect will be reversed on appeal. *Vallejo v. Green*, 16 Cal. 160.

6. When a motion is made to dismiss upon an irregular appearance, and is overruled, and defendant answers, it is not to be considered as such an appearance as waives the irregularity. *Deidesheimer v. Brown*, 8 Cal. 339; *Gray v. Hawes*, 8 Cal. 569.

7. A defendant cannot appear in an action so as to give the Court jurisdiction of his person, except by answering, demurring or giving plaintiff written notice that he appears, and the service of the notice of appearance must antedate or be contemporaneous with the service of all other notices and papers. *Steinback v. Leese*, 27 Cal. 297.

8. The proceedings in this case having been transferred to a magistrate who had jurisdiction by consent of parties, the appearance of defendant, and his consent fixing the time of trial, were a waiver of his right to be brought in by complaint and summons. *Croniss v. Carghill*, 4 Cal. 120.

9. An appearance entered by an attorney, whether authorized or not, is a good and sufficient appearance to bind the party, except in those cases where fraud has been used, or it is shown that the attorney is unable to respond in damages. *Suydam et al. v. Pitcher et al.*, 4 Cal. 280.

10. A notice given by an attorney to plaintiff's attorney that defendant will move, before a Court commissioner, that an attachment issued in the case be dissolved, does not constitute an appearance in the action. *Glidden v. Packard*, 28 Cal. 649.

11. **Attorney is presumed to have authority.**—The authority of an attorney-at-law to appear for parties, for whom he enters an appearance in an action, will be presumed where nothing to the contrary appears. *Hayes v. Shattuck*, 21 Cal. 61; *Willson v. Cleveland*, 30 Cal. 192.

12. The authority of an attorney who appears will be presumed, and his action will bind the party, unless in cases of fraud or insolvency of the attorney. Nor will such action be reviewed on the ground of mistake, unless the mistake be unmixd with any fault or negligence of either the party or his attorney. *Holmes v. Rogers et al.*, 13 Cal. 191.

13. An attorney of the Court, who institutes suit in the name of plaintiff, is presumed *prima facie* to have authority, and the adverse party or his attorney cannot, upon mere suggestion at the bar, deny the right of a party to appear by the attorney of record, nor deny that the attorney so appearing has full authority to prosecute the suit. *Turner v. Caruthers*, 17 Cal. 431.

14. It seems that the appearance of an attorney wholly unauthorized, there being no fraud and no allegation of insolvency, would not give the party a right to assail the judgment on that ground. *Holmes v. Rogers et al.*, 13 Cal. 191.

15. **Appearance in propria persona or by attorney.**—A party to an action may appear in his own proper person or by attorney, but he cannot do both; and, if he appears by attorney, he cannot assume the control of the case. *Board of Commissioners v. Younger*, 29 Cal. 147.

16. **Stipulation of an attorney.**—An attorney-at-law for one of the parties

in a proceeding in a County Court to determine conflicting claims to town lots, cannot, after the Board of Trustees of the town have awarded the lot to his client, pass the client's right or title by a stipulation in the case for the entry of a void judgment. *Ryan v. Tomlinson*, 31 Cal. 11.

17. While an attorney of record remains such, his right to manage and control the action cannot be questioned by the opposite party. *Board of Commissioners v. Younger*, 29 Cal. 147.

18. **Notice to attorney at law is notice to client.**—It is the duty of an attorney to communicate to his client whatever information he acquires in relation to the subject matter of the suit, and he will be presumed to have performed his duty, and notice to him is constructive notice to his client. *Bierce v. Red Bluff Hotel Company*, 31 Cal. 160.

19. **Appearance by mistake.**—See *Forbes v. Hyde*, 31 Cal. 342. See *ante*, § 23, and notes.

§ 524. *Service on non-residents. Where a party has an attorney, service shall be on such attorney.*

When a plaintiff or a defendant who has appeared resides out of the State, and has no attorney in the action or proceeding, the service may be made on the Clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, shall be upon the attorney instead of the party, except of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt.

N. Y. Code, § 415.

§ 525. *Successive actions on the same contract, etc.*

Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom.

§ 526. *Consolidation of several actions into one.*

Whenever two or more actions are pending at one time between the same parties, and in the same Court, upon causes of action which might have been joined, the Court may order the actions to be consolidated into one.

N. Y. Code, § 167; Abb. Forms 1934.

1. The Supreme Court will not consolidate suits brought upon distinct causes of action. *Wallace v. Eldridge* (No. 2), 27 Cal. 498.

§ 527. *Adverse claims, action may be brought to determine.*

An action may be brought by one person against another, for the purpose of determining an adverse claim which the latter makes against the former, for money or property, upon an alleged obligation; and also against two or more persons,

for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as security.

Willard's Eq. Jur., 106-124.

1. Sustained. *King v. Hall*, 5 Cal. 82.

2. Where suit was pending in one Court on a note of defendant, though no summons had been served, and no appearance made: *Held*, that he could not bring a bill in equity in another Court to enjoin the collection of the note or to cancel it, the averment being simply that he has a good defense to the note; *held, further*, that this was not a proceeding under the five hundred and twenty-seventh section of the Practice Act. *Smith v. Sparrow*, 19 Cal. 506.

3. A. and B. executed a joint promissory note to C. B. was surety for A. B. brought an action against C., after the maturity of the note, to compel him at once to proceed and collect the amount due on the note from A., the principal, and obtained a decree requiring C. to commence legal proceedings against A. for the collection of the note, upon B.'s tendering to him a sufficient amount to pay reasonable costs and expenses, or be forever debarred from collecting the same from B. B. deposited with the clerk and sheriff a sufficient amount to pay their costs, and tendered to C. the services of an attorney employed by B. C. refused to commence the action, and A. subsequently became insolvent. *Held*, that this was not a compliance with the conditions of the decree by B., the surety, and that he was not released from his liability on the note. *Dane v. Corduan*, 24 Cal. 158.

§ 528. *The Clerk shall keep a register of actions.*

The Clerk shall keep among the records of the Court, a register of actions. He shall enter therein the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein.

§ 529. *Two of three referees, etc., may do any act.*

When there are three referees, or three arbitrators, all shall meet, but two of them may do any act which might be done by all.

§ 530. *Computation of time in this act. The time within which an act is to be done may be extended.*

The time within which an act is to be done, as provided in this Act, shall be computed by excluding the first day, and including the last; if the last day be Sunday, it shall be excluded. When the act to be done relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the service of notices, other than of appeal, or the preparation of statements, or of bills of exceptions, or of amendments thereto, the time allowed by this Act may be extended, upon good cause shown, by the Court in which the action is pending, or the Judge thereof, or in the absence of such Judge from the county in which the action is pending,

by the County Judge; but such extension shall not exceed thirty days, beyond the time prescribed by this Act, without the consent of the adverse party.

¹ Amended 1861, 591. N. Y. Code, § 407.

1. When the time is important, Courts will inquire into a day, or fractional portion of a day. *People v. Beatty*, 14 Cal. 566.

2. The month contemplated by the statutes of this State, is a calendar and not a lunar month. *L. & S. Society v. Thompson*, 32 Cal. 347.

3. A public action of a summons weekly against a non-resident defendant, commencing on the 10th day of January and ending on the 9th day of April, is a publication of three full calendar months, and the first day of the forty within which the defendant is required to answer is the 10th of April. *Id.*

4. If the last day of the publication of a summons is in the same week in which the three months expires, the publication sufficient to give the Court jurisdiction, although this day is less than three months from the first day of publication. *Id.*

5. If some of the publications of a summons, including the last, are made on Sunday in the regular issues of the paper, it does not vitiate the service. *Id.*

§ 531. *Papers without the title of the action, or with defective title, may be valid.*

An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, shall be as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.

N. Y. Code, § 406.

1. A slight error in the title of a cause, where there is no other suit pending between the parties, will not invalidate the notice. *Mills v. Dunlap*, 3 Cal. 94.

§ 532. *Limitation of actions which have arisen in another State.*

When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of a citizen thereof, who has held the cause of action from the time it accrued.

¹Where a judgment by confession was entered in Pennsylvania, which was afterward opened, and a trial had, which resulted in judgment for plaintiff: *Held*, that our statute of limitations did not commence running until the final entry, although, by the laws of Pennsylvania, the lien of the first judgment was not destroyed. *Parke v. Williams*, 7 Cal. 247.

2. The statute of limitations of this State only commences running against a judgment from the time of the final entry thereof. *Id.*

TITLE LIII.

OF PROCEEDINGS IN CIVIL CASES IN JUSTICES' COURTS.

CHAPTER I.—*Of the parties, and the time and place of commencing actions in Justices' Courts.*

SECTION 533. Certain of the foregoing provisions shall be applicable to Justices' Courts.

534. Parties may appear in person or by attorney.

535. Venue of actions in Justices' Courts.

536. Judgment by confession, venue of.

537. Actions in which parties voluntarily appear, venue of.

§ 533. *¹Certain of the foregoing provisions shall be applicable to Justices' Courts.*

The provisions of title one of this Act, as to parties to actions, shall be applicable to actions of which a Justices' Court has jurisdiction; also, the provisions of this Act from section three hundred and seventeen to section three hundred and thirty-two, both sections inclusive, are hereby made applicable to Justices' Courts, the word "Justice" being substituted for the word "Clerk," and the word "Constable" for the word "Sheriff."

¹Amended statutes 1860, 304.

§ 534. *Parties may appear in person or by attorney.*

Parties in Justices' Courts may prosecute or defend in person, or by attorney; and any person, on the request of a party, may act as his attorney, except that the Constable by whom the summons or jury process was served, shall not appear or act on the trial in behalf of either party.

§ 535. *¹Venue of actions in Justices' Courts.*

[1867-8]. No person shall be held to answer to any summons issued against him from a Justice's Court, in a civil action, in any township or city other than the one in which he shall reside, except in the cases following:

First—When there shall be no Justice's Court for the township or city in which the defendant may reside, or no Justice competent to act on the case.

Second—When two or more persons shall be jointly or jointly and severally bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county, or in different counties, the plaintiff may prosecute his action in a Justices' Court of the township or city in which any of the debtors or other persons liable may reside.

Third—In cases of injury to the person, or to real or personal property, the plaintiff may prosecute his action in the township or city where the injury was committed.

Fourth—Where personal property, unjustly taken or detained, is claimed, or damages therefor are claimed, the plaintiff may bring his action in any township or city in which the property may be found, or in which the property was taken.

Fifth—When the defendant is a non-resident of the county, he may be sued in any township or city wherein he may be found.

Sixth—When a person has contracted to perform any obligation at a particular place, and reside, in another county or in a township or city of the same county, he may be sued in the township or city in which such obligation is to be performed or in which he resides; and for the purpose of Justices' Courts' jurisdiction under this clause, the township or city in which the obligation is incurred shall be deemed to be the township or city in which it is to be performed, unless there is a special contract to the contrary.

Seventh—When the foreclosure of a mortgage or the enforcement of a lien upon personal property is sought by the action, the plaintiff may sue in the township or city where the property is situated.

Eighth—Any person or persons residing in the city of San Francisco may be held to answer to any summons issued against him or them from the Court of a Justice for any township within the corporate limits of the city of San Francisco, in any action or proceeding whereof Justices of the Peace of the city or county of San Francisco have, or may have, jurisdiction by law; *provided*, nothing herein

by the voluntary appearance and pleadings of the parties without summons. In the latter case the action shall be deemed commenced at the time of appearance.

§ 539. *Appointment of guardians.*

When a guardian is necessary, he shall be appointed by the Justice, as follows:

First—If the infant be plaintiff, the appointment shall be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years or upwards; if under that age, upon the application of some relative or friend. The consent in writing of the guardian to be appointed, and to be responsible for costs, if he fail in the action, shall be first filed with the Justice.

Second—If the infant be defendant, the guardian shall be appointed at the time the summons is returned, or before the pleadings. It shall be the right of the infant to nominate his own guardian, if the infant be over fourteen years of age, and the proposed guardian be present and consent in writing to be appointed. Otherwise, the Justice may appoint any suitable person who gives such consent.

§ 540. *Summons, formal and substantial facts of.*

The summons shall be addressed to the defendant by name, or if his name be unknown, by a fictitious name; and shall summon him to appear before the Justice at his office, naming its township or city, and at a time specified therein, to answer the complaint of the plaintiff, for a cause of action therein described in general terms, sufficient to apprise the defendant of the nature of the claim against him; and in action for money or damages, shall state the amount for which the plaintiff will take judgment, if the defendant fail to appear and answer. It shall be subscribed by the Justice before whom it is returnable.

§ 541. *Time within which summons shall be returned.*

[1867-8.] The time in which the summons shall require the defendant to appear and answer the complaint shall be as follows:

First—If the plaintiff and defendant reside in the town-

An Act to regulate proceedings in Civil Cases in the Justices' Courts of the City and County of San Francisco.

SEC. 1. The time in which the summons shall require the defendant to appear and answer the complaint, shall be as follows: When the action is brought in the City and County of San Francisco, within three days after the service thereof.

Approved February 13, 1872—took effect immediately.

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Third—If the plaintiff reside out of the township where the action is brought and the defendant resides in said township, within three days after the service thereof.

Fourth—If the defendant reside out of the county or township in which the action is brought and plaintiff resides in said township, within fifteen days after the service thereof. The defendant may appear in the action by demurrer or answer any time after service of summons upon him, and shall notify the plaintiff, by written notice, of such appearance. If any of the defendants shall fail to answer or appear in the action within the time prescribed in the summons, such default shall be entered by the Justice in his docket. If all the defendants shall fail to appear or answer within the time prescribed in the summons, the Justice shall thereupon enter judgment against them for the amount demanded in the summons, where the action is brought upon a contract for the direct payment of money; and in all other cases shall hear the proofs and give judgment in accordance with the pleadings and proofs. Where all the defendants served with process shall have appeared, or some of them have appeared and the remaining defendants have made default, the Justice may proceed to try the cause, or, upon good cause shown by either party, may fix the day for trial on any subsequent day not more than ten days thereafter.

Amended statutes 1867-8, 550.

1. A Justice of the Peace cannot make a summons returnable in eleven days after service. *Deidesheimer v. Brown*, 8 Cal. 339.

2. In a suit commenced before a Justice of the Peace, if the summons be returned by the officer, with his indorsement thereon that no service has been made because defendant cannot be found, and on the return day thereof it is further made to appear by affidavit that the defendant conceals himself to avoid service of process, the suit does not thereby abate, but the magistrate may continue the cause, issue a new summons, and make an order for its service by publication, and fix the return day of the new summons at a time sufficiently remote to have the service by publication completed before the return day, even if the period between the issuance of the new summons and its return day exceeds ten days. *Seaver v. Fitzgerald*, 23 Cal. 86.

3. In such case, when an attachment is regularly issued by the Justice, at

the time of the issuance of the first summons, the attachment is not vitiated by the failure to serve the first summons, and the issuance of a second one; nor is the validity of attachment in any way affected by the proceedings. *Id.*

4. Where the summons is required to be published, it may be made returnable more than ten days from its date, but not otherwise. *Hiser v. Carr et al.*, Jan. T. 1868.

§ 542. *Service of summons.*

The summons shall be served by the Sheriff or a Constable of the county, as follows:

1st. If the action be against a corporation, by delivery of a copy to the President or other head of the corporation, or to the Secretary, Cashier, or Managing Agent thereof; or when no such officer resides in the county, to a Director resident therein;

2d. If against a minor under the age of fourteen years, by delivery of a copy to such minor, and also to his father, mother, or guardian; or if there be none within the county, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is;

3d. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, by delivery of a copy to such guardian;

4th. In all other cases, by delivery of a copy to the defendant personally.

See § 604.

1. A summons issued from a Justice of the Peace at the suit of plaintiff against Adams & Co., which was returned served by "leaving a copy thereof with Capt. Charles D. Macy:" *Held*, that a judgment by default would not bind Adams & Co., and there is nothing in the record to connect Macy with them. *Adams v. Town*, 3 Cal. 248.

2. Constables may appoint deputies. *Taylor v. Brown*, 4 Cal. 188.

3. A constable has no power to execute process out of his township. *Low v. Alexander*, 15 Cal. 290.

§ 543. *Service by publication.*

When the person upon whom the service is to be made resides out of the State, or has departed from the State, or cannot after due diligence be found within the State, or conceals himself to avoid the service of summons, and the fact shall appear, by affidavit, to the satisfaction of the Justice, and it shall, in like manner, appear that a cause of action exists against the defendant in respect to whom the service is to be made,

the Justice shall grant an order that the service be made by the publication of the summons; the order shall direct the publication to be made in a newspaper, to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; *provided*, that publication against a defendant residing out of the State, or absent therefrom, shall not be less than three months. The service of summons shall be deemed complete at the expiration of the time prescribed by the order of publication; the Justice shall also direct a copy of the summons to be forthwith deposited in the post-office, directed to the person to be served at his place of residence.

¹Amended 1854, §5; see *ante*, §§ 30, 31.

1. In a suit commenced before a Justice of the Peace, if the summons be returned by the officer with his indorsement thereon, that no service has been made because defendant cannot be found, and on the return day thereof it is further made to appear by affidavit that the defendant conceals himself to avoid service of process, the suit does not thereby abate, but they may continue the cause, issue a new summons, and make an order for its service by publication, and fix the return day of the new summons at a time sufficiently remote to have the service by publication completed before the return day, even if the period between the issuance of the new summons and its return day exceeds ten days. *Slaver v. Fitzgerald*, 23 Cal. 86.

2. In such case, when an attachment is regularly issued by the Justice, at the time of the issuance of the first summons, the attachment is not vitiated by the failure to serve the first summons, and the issuance of a second one; nor is the validity of attachment in any way affected by the proceedings. *Id.*

3. The affidavit must show that a cause of action exists in favor of plaintiff and against defendant. *Hisler v. Carr et al.*, Jan. T. 1868.

4. The affidavit stated that the "defendant, D. C. Seaver, was at the time a resident of the first township in the county of Contra Costa; that he had occupied a house on a tract of land claimed to be his own, and which he had cultivated up to the commencement of the suit, and for a long time previous; that on the twenty-second day of October, the day before the commencement of the suit, he left his residence, informing his servant that he would be back that evening or the next day; that the summons in the suit was put in the hands of a proper constable, who made diligent search and was unable to serve it; that Seaver had not returned to his residence, and that he believed that he concealed himself for the purpose of avoiding the service of the summons, and the claim sued on is a just debt." *Seaver v. Fitzgerald*, 23 Cal. 86.

5. *Held*, to be sufficient to authorize the service by publication, and when publication made, to give the Court jurisdiction. *Id.*

6. A summons issued from a Justice's Court may be made returnable more than ten days from its date, where service by publication is required. Where the affidavit fails to show that a cause of action exists in favor of the plaintiff against the defendant, the Justice has no power to extend the return day beyond ten days from its date. In such a case, the summons is void, and an attachment issued in the action must also fail. *Hisler v. Carr*, Jan. T. 1868.

7. An order of publication of summons, made by a Justice, need not state that the paper designated is the one most likely to give notice to the person to be served. *Seaver v. Fitzgerald*, 23 Cal. 86.

8. The publication of summons may be proved by the affidavit of the clerk of the publisher of the paper; and the fact that the summons was deposited in a postoffice, may also be proved by affidavit; nor is it necessary that the

constable state in his return on the summons that such publication was made, and such deposit made in the postoffice. *Id.*

§ 544. *Order of arrest, and arrest of defendant.*

An order to arrest the defendant may be endorsed on a summons issued by the Justice, and the defendant may be arrested thereon by the Sheriff or Constable, at the time of serving the summons, and brought before the Justice, and there detained until duly discharged in the following cases, arising after the passage of this Act:

1st. In an action for the recovery of money, or damages, on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the State, with intent to defraud his creditors; or where the action is for a willful* injury to the person, or for taking, detaining, or injuring personal property;

2d. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use by an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity;

3d. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought;

4th. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors. But no female shall be arrested in any action.

§ 545. *Affidavit and undertaking for order of arrest.*

Before an order for an arrest shall be made, the party applying shall prove to the satisfaction of the Justice, by the affidavit of himself or some other person, the facts on which the application is founded. The plaintiff shall also execute and deliver to the Justice a written undertaking, with two or more sureties, to the effect that if the defendant recover judgment, the plaintiff will pay to him all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least two hundred dollars.

§ 546. *A defendant arrested shall be taken before the Justice immediately.*

The defendant, immediately upon being arrested, shall be taken to the office of the Justice who made the order, and if he be absent or unable to try the action, or if it be made to appear to him by the affidavit of defendant, that he is a material witness in the action, the officer shall immediately take the defendant before the next Justice of the city or township, who shall take cognizance of the action, and proceed thereon, as if the summons had been issued and the order of arrest made by him.

See § 582.

§ 547. *The officer shall give notice to the plaintiff of the arrest.*

The officer making the arrest shall immediately give notice thereof to the plaintiff, or his attorney or agent, and endorse on the summons, and subscribe a certificate, stating the time of serving the same, the time of the arrest, and of his giving notice to the plaintiff.

§ 548. *The officer shall detain the defendant until duly discharged.*

The officer making the arrest shall keep the defendant in custody until duly discharged by order of the Justice.

§ 549. *Defendant may demand trial immediately.*

The defendant under arrest, on his appearance with the officer, may demand a trial immediately; and upon such demand being made, the trial shall not be delayed beyond three hours, except by the trial of another action pending at the time; or he may have an adjournment, and be discharged on giving bail, as provided in the next section. An adjournment at the request of the plaintiff, beyond three hours, shall discharge the defendant from arrest, but the action may proceed, notwithstanding; and the defendant shall be subject to arrest on the execution, in the same manner as if he had not been so discharged.

See § 582.

§ 550. *Adjournment on motion of defendant shall be granted on filing undertaking.*

If the defendant on his appearance demand an adjournment, the same shall be granted, on condition that he execute and file with the Justice an undertaking, with two or more sufficient sureties, to be approved by the Justice, to the effect that he will render himself amenable to the process of the Court during the pendency of the action, and such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action. On filing the undertaking specified in this section, the Justice shall order the defendant to be discharged from custody.

§ 551. *Attachment against property of defendant may be made in certain cases.*

In an action upon a contract, express or implied, made after the passage of this Act, for the direct payment of money, which contract is made or is payable in this State, and is not secured by mortgage, lien, or pledge upon real or personal property, the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as hereinafter provided.

¹Amended Stat. 1858, 154; 1860, 304.

1. An attachment may be issued on a debt contracted at any time since the passage of the Practice Act, April 29th, 1851. *O'Connor v. Blake*, 29 Cal. 312.

2. The words made after the passage of this act, in the act concerning attachments, are not limited to debts contracted after the amendment of the act in 1860, but refer to the act as passed in 1851. *Id.*

3. When an officer, by virtue of a second attachment, levies on property already in his possession by virtue of a former attachment, it is only necessary for him to return that he has attached the interest of the defendant in the property then in his possession. *Id.*

4. In case of a dismissal of an action by a Justice of the Peace for non-appearance of the plaintiff, the judgment for defendant operates as a dissolution of an attachment, although the Justice reinstates the case and the parties appear and try it. *Id.*

5. In a suit commenced before a Justice of the Peace, if the summons be returned by the officer, with his endorsement thereon, that no service has been made because defendant cannot be found, and on the return day thereof it is further made to appear by affidavit that the defendant conceals himself to avoid service of process, the suit does not thereby abate, but the magistrate may continue the cause, issue a new summons, and make an order for its service by publication, and fix the return day of the new summons at a time sufficiently remote to have the service by publication completed before the return day, even if the period between the issuance of the new summons and its return day exceeds ten days. *Seaver v. Fitzgerald*, 23 Cal. 85.

6. In such case when an attachment is regularly issued by the Justice at the

time of the issuance of the first summons, the attachment is not vitiated by the failure to serve the first summons and the issuance of a second one, nor is the validity of the attachment in any way affected by the proceedings. *Id.*

7. Where the summons is unauthorized and void, the attachment must fall also. *Hiser v. Carr et al.*, Jan. T. 1868.

§ 552. *Writ of attachment shall issue upon affidavit.*

A writ to attach the property of the defendant shall be issued by the Justice, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in section one hundred and twenty-one of this Act.

¹Amended 1858, 154.

1. This section was not amended so as to authorize an attachment upon a contract made prior to the passage of this act, or against nonresidents, as in section one hundred and twenty.

§ 553. *Undertaking on attachment shall be required. (a)*

SEC. 553. Before issuing the writ, the Justice must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, in a sum not less than fifty nor more than three hundred dollars, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.—Approved February 5, 1872.

~~AMENDED 1858, 152; 1859, 300.~~

1. If a Justice issue an attachment, and take bond in a suit for a sum exceeding his jurisdiction, the proceedings are void, and no action lies on the bond. *Benedict v. Bray*, 2 Cal. 251.

2. Where the undertaking or statement is conditioned to pay all damages, etc., not exceeding a certain sum, the attachment is unauthorized and void. *Hiser v. Carr*, Jan. T. 1868.

3. The Practice Act, section five hundred and fifty-three, requires an undertaking to the effect that plaintiff will pay all damages, etc., without any limitation as to the amount. The attachment is unauthorized and void, unless issued in substantial conformity with the provisions of the statute. *Id.*

§ 554. *Writ of attachment, substance of. Officer may take an undertaking instead of levying.*

The writ may be directed to the Sheriff or any Constable of the county, and shall require him to attach and safely keep all the [property of the defendant] within his county,

(1.) STAT. 1863-4, p. 428.

(c) SEC. 1. In all civil cases arising in Justices' Courts, wherein an undertaking is required as prescribed in section twenty-eight of an Act entitled an Act to regulate proceedings in civil cases in Courts of Justice in this State, passed April twenty-eighth, eighteen hundred and sixty, and sections five hundred and forty-five (545) and five hundred and fifty (550) of an Act entitled an Act to regulate proceedings in civil cases in Courts of Justice in this State, passed May fifteenth, eighteen hundred and fifty-four, the plaintiff or defendant may deposit with said Justice a sum of money equal to the amount required by said undertaking, which said sum of money shall be taken as security in place of said undertaking.

not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, unless the defendant give him security by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand besides costs; in which case, to take such undertaking.

§ 555. *Certain preceding provisions shall apply to attachments in Justices' Courts.*

The sections of this act, from section one hundred and twenty-four to section one hundred and forty-one, both inclusive, shall be applicable to attachments issued in Justices' Courts; the word "Constable" being substituted for the word "Sheriff," whenever the writ is directed to a Constable, and the word "Justice" being substituted for the word "Judge."

§ 556. *Plaintiff may replevy personal property.*

The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him, as provided in this chapter.

See *ante*, § 200.

§ 557. *Affidavit in replevin.*

When a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

1st. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof;

2d. That the property is wrongfully detained by the defendant;

3d. The alleged cause of the detention thereof, according to his best knowledge, information and belief;

4th. That the same has not been taken for a tax, assessment or fine, pursuant to statute; or seized under an execution, on an attachment against the property of the plaintiff, or if seized, that it is by statute exempt from such seizure; and

5th. The actual value of the property.

§ 558. *The Justice shall order to replevy the property upon receiving an undertaking.*

The Justice shall thereupon, by an indorsement in writing upon the affidavit, order the Sheriff or a Constable of the county to take the same from the defendant, and deliver it to the plaintiff, upon receiving the undertaking mentioned in the following section.

§ 559. *Undertaking in replevin. The officer shall serve the affidavit, order and undertaking on the defendant.*

Upon receipt of the affidavit and order, with a written undertaking, executed by two or more sufficient sureties, approved by the officer, to the effect that they are bound in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the officer shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, order and undertaking, by delivering the same to him personally, if he can be found within the county, or to his agent from whose possession the property is taken; or if neither can be found within the county, by leaving them at the usual place of abode of either within the county, with some person of suitable age and discretion; or if neither have any known place of abode within the county, by putting them into the nearest post-office, directed to the defendant.

§ 560. *Defendant may except to the sureties. The officer shall be responsible until the sureties justify.*

The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the officer that he excepts to the sufficiency of the sureties; if he fails to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice before the Justice; and the offi-

cer shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

§ 561. *The defendant may within two days require a return of the property.*

At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the officer a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required within two days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in this chapter.

§ 562. *Defendant's sureties shall justify. Officer to be responsible until such justification.*

The defendant's sureties, upon reasonable notice to the plaintiff, shall justify before the Justice; and upon such justification, the officer shall deliver the property to the defendant. The officer shall be responsible for the defendant's sureties until they justify, or until the justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place fail to justify at the time appointed, he shall deliver the property to the plaintiff.

§ 568. *If the property be concealed, duty of the officer.*

If the property or any part thereof be concealed in a building or inclosure, the officer shall publicly demand its delivery; and if it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession.

564. *The officer shall deliver the property to the party entitled thereto.*

When the officer shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping the same.

§ 565. *Claim of the property by a third party, proceedings upon.*

If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the officer, the officer shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the officer against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the officer, unless so made.

§ 566. *The officer shall return the order and affidavit within five days.*

The officer shall return the order and affidavit, with his proceedings thereon, to the Justice within five days after taking the property mentioned therein.

§ 567. *Qualification of sureties in this chapter.*

The qualification of sureties on the several undertakings mentioned in this chapter shall be as follows.

SEC. 567. The qualification of sureties in the several undertakings required by this chapter, shall be as follows: First.—Each of them shall be a resident and householder or freeholder, within the county. Second.—Each shall be worth the amount stated in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution.—

Amendment approved March 2, 1872.

§ 568. *Manner of justification of sureties.*

cer shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

§ 561. *The defendant may within two days require a return of the property.*

At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the officer a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required within two days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in this chapter.

§ 562. *Defendant's sureties shall justify. Officer to be responsible until such justification.*

The defendant's sureties, upon reasonable notice to the plaintiff, shall justify before the Justice; and upon such justification, the officer shall deliver the property to the defendant. The officer shall be responsible for the defendant's sureties until they justify, or until the justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place fail to justify at the time appointed, he shall deliver the property to the plaintiff.

§ 563. *If the property be concealed, duty of the officer.*

If the property or any part thereof

... the property to the party entitled

When the officer shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping the same.

§ 565. *Claim of the property by a third party, proceedings upon.*

If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the officer, the officer shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the officer against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the officer, unless so made.

§ 566. *The officer shall return the order and affidavit within five days.*

The officer shall return the order and affidavit, with his proceedings thereon, to the Justice within five days after taking the property mentioned therein.

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2d. Each shall be worth double the amount stated in the ndertaking, over and above all his debts and liabilities, xclusive of property exempt from execution.

§ 568. *Manner of justification of sureties.*

For the purpose of justification, each of the sureties shall attend before the Justice at the time mentioned in the notice, and may be examined on oath, on the part of the adverse party, touching his sufficiency, in such manner as the Justice in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the sureties, if required.

§ 569. *Examination to be annexed to the undertaking.*

If the Justice find the sureties sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and file the same, and the officer shall thereupon be exonerated from liability.

TITLE LV.

CHAPTER III.—*Pleadings and trial.*

- SECTION 570. Pleadings in Justices' Courts.
- 571. Pleadings, in what cases to be in writing or oral.
 - 572. Pleadings, manner of presenting and form of.
 - 573. Complaint, contents of.
 - 574. Answer, contents of.
 - 575. Statement of insufficient knowledge, etc., shall be deemed a denial.
 - 576. Manner of pleading a written instrument.
 - 577. If a copy of an instrument be filed, the signatures will be deemed admitted, unless denied under oath.
 - 578. Demurrer to pleadings in Justices' Courts.
 - 579. Variance between the proof and the allegations in a pleading.
 - 580. Amendment of pleadings.
 - 581. Title to real estate cannot be questioned before a Justice. Such cases shall be certified to the District Court.
 - 582. Change of venue in certain cases. Adjournment on demand of a jury.
 - 583. Adjournment not to exceed ten days.
 - 584. Adjournment not to exceed four months for same cause.
 - 585. No continuance for more than ten days shall be granted, unless upon filing undertaking.
 - 586. Failure of either party to appear, effect of.
 - 587. Trial by jury. Summoning jury.
 - 588. Empanneling the jury. Number necessary to compose a jury.
 - 589. If a sufficient number of jurors do not attend, others shall be summoned.
 - 590. Challenges to jurors.

§ 570. *Pleadings in Justices' Courts.*

The pleadings in Justices' Courts shall be:

1st. The complaint by the plaintiff, stating the cause of action;

2d. The answer by the defendant, stating the ground of the defense.

1. The rule, a penal statute, must be declared upon by the party seeking a recovery under it, does not apply to pleadings in Justices' Courts. *O'Callaghan v. Booth*, 6 Cal. 66; *Hart v. Moon*, Id. 161.

2. Where the complaint in a Justice's Court, in addition to a good cause of action, contains averments and prays relief respecting matters not within the jurisdiction of the Court, the action should not for that reason be dismissed, but the Court should direct an amendment and disregard the objectionable matter. *Howard v. Valentine*, 20 Cal. 282.

§ 571. *Pleadings, in what cases to be in writing or oral.*

The pleading shall be in writing, and verified by the oath of the party, his agent or attorney, when the action is:

1st. For the foreclosure of any mortgage, or the enforcement of any lien on personal property;

2d. For a forcible or unlawful entry upon, or a forcible or unlawful detention of lands, tenements, or other possessions;

3d. To recover possession of a "mining claim." In other cases the pleadings may be oral or in writing.

See Amendments to the Constitution, 1862.

§ 572. *Pleadings, manner of presenting, and form of.*

When the pleadings are oral, the substance of them shall be entered by the Justice in his docket; when in writing they shall be filed in his office, and a reference to them made in the docket. Pleadings shall not be required to be in any particular form, but shall be such as to enable a person of common understanding to know what is intended.

1. It is not the policy of the law to confine parties to any nice strictness in pleading, particularly before Justices of the Peace; accordingly, when a party, instead of demurring for informality, goes to trial, it must be considered as cured by the verdict. *Cronies v. Oarghill*, 4 Cal. 120.

2. Pleading in Justices' Courts construed with great liberality; and if the facts stated be sufficient to show the nature of the claim or defense, nothing further is required. To reverse a judgment had in such Courts for defects in the complaint, the defects should be such as were calculated to mislead the adverse party. *Stuart v. Lander*, 16 Cal. 372.

§ 573. *Complaint, contents of.*

The complaint shall state in a plain and direct manner the facts constituting the cause of action.

1. A note, with the proper indorsements thereon, filed with a Justice of the Peace, is a sufficient complaint. *Hamilton v. McDonald*, 18 Cal. 128.

§ 574. *Answer, contents of.*

The answer may contain a denial of any of the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defense, or a counter claim, upon which an action may be brought by the defendant against the plaintiff in a Justices' Court.

1. An answer in a Justice's Court, denying generally the allegations of the complaint, conforms substantially to section five hundred and seventy-four of the Practice Act. *Sullivan v. Cary*, 17 Cal. 80.

2. Where a defendant appears for the purpose of taking advantage of irregular summons by motion to dismiss, it does not amount to a waiver of his rights so as to cure the defect. *Deidesheimer v. Brown*, 8 Cal. 539.

3. Nor does he waive his rights by answering after moving to dismiss, and motion overruled. *Id. Gray v. Hawes*, *Id.* 569.

4. Though the Civil Practice Act provides that pleadings in Justices' Courts must in some cases be verified, yet it does not require that the answer should deny specifically the allegations in the complaint; a general denial will be sufficient. *Minburn v. Burr*, 20 Cal. 49.

5. The objection to the jurisdiction on the ground of excess of value of the subject in controversy, is properly taken by answer; and when so taken, should be determined before proceeding to hear the merits of the action. *Small v. Guin*, 6 Cal. 447.

6. Act does not require the answer to a verified complaint in an action in a Justice's Court to controvert specifically the material allegations of such complaint. It is sufficient if the answer deny the material allegations, either generally or specifically. *Minburn v. Burr*, 20 Cal. 48.

7. A defendant in a Justice's Court cannot set up a counter claim for a sum exceeding three hundred dollars. *Moxfield v. Johnson*, 30 Cal. 545.

§ 575. *Statement of insufficient knowledge, etc., shall be deemed a denial.*

A statement in an answer that the party has not sufficient knowledge or information in respect to a particular allegation in the previous pleading of the adverse party to form a belief, shall be deemed equivalent to a denial.

§ 576. *Manner of pleading a written instrument.*

When the cause of action or counter claim arises upon an account or instrument for the payment of money only, it shall be sufficient for the party to deliver a copy of the account or instrument to the Court, and to state that there is due to him thereupon, from the adverse party, a specified sum, which he claims to recover or set off. The Court may, at the time of the pleading, require that the original account or instrument be exhibited to the inspection of the adverse party, and a copy to be furnished; or if it be not so exhibited and a copy furnished, may prohibit its being afterwards given in evidence.

1. A note, with the proper indorsements thereon, filed with a Justice of the Peace, is a sufficient complaint. *Hamilton v. McDonald*, 18 Cal. 128.

2. A Justice of the Peace has no jurisdiction to pass upon a counter claim, or set-off, unless it be for such a sum as the defendant might have maintained in an action against the plaintiff in a Justice's Court. *Molson v. Vaughn*, 23 Cal. 61.

§ 577. *If a copy of an instrument be filed, the signature thereon will be deemed admitted, unless denied under oath.*

If the plaintiff annex to his complaint, or file with the Justice at the time of issuing the summons, a copy of the promissory note, bill of exchange, or other written obligation for the payment of money upon which the action is brought, the defendant shall be deemed to admit the genuineness of the signatures of the makers, indorsers, or assignors thereof, unless he specifically deny the same in his answer, and verify the answer by his oath.

¹Amended 1854, 96.

§ 578. *Demurrer to pleadings in Justices' Courts.*

Either party may object to a pleading of his adversary, or to any part thereof, that it is not sufficiently explicit to enable him to understand it, or that it contains no cause of action or defense, although it be taken as true. If the Court deem the objection well founded, it shall order the pleading to be amended, and if the party refuse to amend, the defective pleading shall be disregarded.

1. It is not the policy of the law to confine parties to any nice strictness in pleading, particularly before Justices of the Peace. Accordingly, where a party, instead of demurring for informality, goes to trial, it must be considered as cured by the verdict. *Cronise v. Cargill*, 4 Cal. 120.

See notes under § 574.

§ 579. *Variance between the proof and the allegations in a pleading.*

A variance between the proof on the trial and the allegations in a pleading, shall be disregarded as immaterial, unless the Court be satisfied that the adverse party has been misled to his prejudice thereby.

1. If the answer sets up as a defense in an action on a bill of exchange a total failure of consideration, and the proof shows a partial failure only, the variance is not an available one under our practice. *Plate v. Vega*, 31 Cal. 383.

§ 580. *Amendments of pleadings.*

The pleadings may be amended at any time before the

trial, to supply a deficiency or omission, when by such amendment substantial justice will be promoted. If the amendment be made after the issue, and it be made to appear to the satisfaction of the Court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The Court may also, in its discretion, require as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the Court, not exceeding twenty dollars; but such payment shall not be required unless an adjournment is made necessary by the amendment; nor shall an amendment be allowed after a witness is sworn on the trial, when an adjournment thereby will be made necessary.

1. Pleadings in Justices' Courts are not held to much strictness. Where plaintiff avers he is administrator in fact of the intestate, and this is not denied in the answer, no further proof of plaintiff's right to sue is requisite. *Liening v. Gould*, 13 Cal. 598.

2. A Justice of the Peace has the right to allow a complaint to be amended in all respects, so that the case may be determined on its merits; and this, whether the defect be in the statement of jurisdiction or any other fact. The greatest liberality and indulgence should be extended in all such applications. *Linhart v. Buiff et al.*, 11 Cal. 280.

3. This is a privilege which is never denied, whether the question be one of jurisdiction or otherwise. *Grass Val. Quartz Min. Co. v. Stackhouse*, 6 Cal. 413.

4. It is error to refuse to allow a plaintiff to strike out a claim for damages, without regard to the purpose which may influence him. *Id.*

5. Amendments should be readily allowed whenever they will tend to the furtherance of justice, and the greatest liberality in this respect should be extended to pleadings in Justices' Courts. *Buller v. King*, 10 Cal. 342.

§ 581. *Title to real estate cannot be questioned before a Justice. Such cases shall be certified to a District Court.*

The parties shall not be at liberty to give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, nor shall any issue presenting such question be tried by said justice; and if it appear, from the plaintiff's own showing on the trial, or from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property, or the legality of any tax, impost, assessment, toll, or municipal fine, the Justice shall suspend all further proceedings in the action and certify the pleadings, or if the pleadings be oral, a transcript of the same, from his docket to the District Court of the County, and from

the time of filing such pleadings or transcript with the County Clerk, the District Court shall have over the action the same jurisdiction as if it were commenced therein.

¹Amended: 1863-4, 117.

1. Where in a suit in a Justice's Court for damages to real property, the answer put in issue the ownership of the property, and the defendant moved to transfer the case to the District Court for trial, which motion was refused; and after trial before the Justice, judgment was rendered for plaintiff, and the defendant appealed to the county Court, where the judgment was set aside, and an order made transferring the case to the District Court, where, after trial, plaintiff again had judgment: *Held*, that the county Court had authority, under sections five hundred and eighty-one and three hundred and sixty-seven of the Practice Act, to transfer the case to the District Court; that the effect of the appeal to the County Court was to vest it with authority to make all orders necessary for the determination of the case; and as the case was to be tried *de novo*, and the County Court was incompetent, under the statute, to try it, the transfer to the District Court was necessary. *Cullen v. Langridge*, 17 Cal. 67.

2. If upon the filing of the defendant's verified answer in a Justice's Court it appears in the answer that the determination of the action will necessarily involve a question of title to real property, the cause should be transferred to a District Court, and when so transferred, the District Court obtains complete jurisdiction in the premises. *Doherty v. Thayer*, 31 Cal. 140.

§ 582. ¹*Change of venue in certain cases. Adjournment on demand of a jury.*

If, at any time before the trial, it appear to the satisfaction of the Justice before whom the action is brought, by affidavit of either party, that such justice is a material witness for either party, or if either party make affidavit that he has reason to believe, and does believe, that he cannot have a fair and impartial trial before such Justice, by reason of the interest, prejudice, or bias of the Justice, the action may be transferred to some other Justice of the same or a neighboring township; and in case a jury be demanded, and affidavit of either party is made that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township against him, the action may be transferred to some other Justice of the Peace in the county; but only one transfer shall be allowed to either party. The Justice to whom an action may be transferred by the provisions of this section, shall have and exercise the same jurisdiction over the action as if it had been originally commenced before him. The Justice ordering the transfer of the action to another Justice, shall immediately transmit to the latter, on payment by the party

applying of all the costs that have accrued, all the papers in the action, together with a certified transcript from his docket of the proceedings therein. The Justice to whom the case is transferred shall issue a notice, stating the time and place when and where the trial will take place, which notice shall be served upon the parties by any officer authorized to serve process in a Justice's Court, or by any person specially deputed by the Justice for that purpose, at least one day before the trial.

¹Amended 1853, 279; 1863, 502.

Upon the return day of the summons, if a jury be required, or, if the Justice be actually engaged in other official business, he may adjourn the trial without the consent of either party, as follows:

1st. When a party who is not a resident of the county is in attendance, the adjournment not to exceed twenty-four hours; when the defendant in attendance is under arrest, the adjournment not to exceed three hours;

2d. In other cases, not to exceed five days.

1. Where a Justice is interested in the event of a suit, the statute requires that he should transfer the case before another Justice. *Larue v. Gasline*, 5 Cal. 507.

2. A Justices' Court to which a case has been transferred from another similar Court, may again, for cause shown, change the venue. *The People ex rel. Hagley v. Hubbard*, 22 Cal. 34.

§ 588. *¹Adjournment not to exceed ten days for want of material testimony.*

The trial may be adjourned by consent, or upon application of either party, without the consent of the other, for a period not exceeding ten days, (except as provided in the next section), as follows:

1st. The party asking the adjournment shall, if required by his adversary, prove by his own oath, or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and shall show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so;

2d. The party asking the adjournment shall also, if required by the adverse party, consent that the testimony

of any witness of such adverse party, who is in attendance, be then taken by deposition before the Justice, which shall accordingly be done, and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections as if the witness were produced; but such objections shall be made at the time of taking the deposition;

3d. The Court may also require the moving party to state, upon affidavit the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed.

¹Amended 1854, 96.

§ 584. *Adjournment not to exceed four months, for same cause.*

An adjournment may be had, either at the time of joining issue, or at any subsequent time to which the case may stand adjourned, on application of either party, for a period longer than ten days, but not to exceed four months, from the time of the return of the summons, upon proof by the oath of the party, or otherwise, to the satisfaction of the Justice, that such party cannot be ready for trial before the time to which he desires an adjournment, for want of material evidence, particularly describing it, and that the delay has not been made necessary by any act or negligence on his part since the action was commenced; that he has used due diligence to procure the evidence, and has been unable to do so, and that he expects to procure the evidence at the time stated by him: provided, that if the adverse party admit that such evidence would be given, and consent that it may be considered as given on the trial, or offered or overruled as improper, the adjournment shall not be had.

¹Amended 1854, 96.

§ 585. *No continuance for more than ten days shall be granted, unless upon filing undertaking.*

No adjournment shall be granted for a period longer than ten days, upon the application of either party, except

upon condition that such party file an undertaking, with sureties, to be approved by the Justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying.

§ 586. *Failure of either party to appear, effects of.*

[1867-8.] If either party shall fail to appear at the time fixed for trial, or at the time to which the trial has been adjourned, the trial may proceed at the request of the adverse party, and judgment shall be rendered in conformity with the pleadings and proofs.

587. *Trial by jury. Summoning jurors.*

A trial by jury shall be demanded at the time of joining issue; and shall be deemed waived if neither party then demand it. When demanded, the trial of the case shall be adjourned, until a time and place fixed for the return of the jury. If neither party desire an adjournment, the time and place shall be determined by the Justice, and shall be on the same day, or within the next two days. The jury shall be summoned upon an order of the Justice, from the citizens of the city or township, and not from the bystanders.

§ 588. *Empanneling a jury. Number necessary to compose a jury.*

At the time appointed for the trial, the Justice shall proceed to call, from the jurors summoned, the names of the persons to constitute the jury for the trial of the issue. The jury, by consent of the parties, may consist of any number not more than twelve nor less than three.

§ 589. *If a sufficient number of jurors do not attend, others shall be summoned.*

If a sufficient number of competent and indifferent jurors do not attend, the Justice shall direct others to be summoned from the vicinity, and not from the bystanders, sufficient to complete the jury.

§ 590. *Challenges of jurors.*

Either party may challenge the jurors. The challenges

shall be either peremptory, or for cause. Each party shall be entitled to three peremptory challenges. Either party may challenge for cause, on any grounds set forth in section one hundred and sixty-two. Challenges for cause shall be tried by the Justice in a summary manner, who may examine the juror challenged, and witnesses.

TITLE LVI.

CHAPTER IV.—*Judgment and execution.*

- SECTION 591. Judgment of dismissal entered in certain cases without prejudice.
592. Judgment for plaintiff by default.
593. Upon issue joined, the Justice shall try the cause and render judgment.
594. Entry of judgment, time and manner of.
595. If the sum found due exceeds the jurisdiction of the Justice, the excess may be remitted.
596. Offer to compromise before trial.
597. Judgment when the defendant is subject to arrest.
598. Costs shall be added to the verdict.
599. Execution issued by the Justice, except when it is to run out of the county. Judgment liens, how created.
600. Execution may issue at any time within five years.
601. Execution, contents of.
602. Duty of officer receiving execution. Supplementary proceedings.

§ 591. *Judgment of dismissal entered in certain cases without prejudice.*

Judgment that the action be dismissed without prejudice to a new action, may be entered with costs in the following cases :

1st. When the plaintiff voluntarily dismisses the action before it is finally submitted;

2d. When he fails to appear at the time specified in the summons, or upon adjournment, or within one hour thereafter;

3d. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or township, or city; but if the objection be taken and overruled, it shall be cause only of reversal on appeal, and shall

not otherwise invalidate the judgment; if not taken at the trial, it shall be deemed waived, and shall not be cause of reversal.

1. Suit brought in Justice's Court for township No. 5, service on defendant in township No. 3, by Constable of township No. 3. Defendant appears, and before filing answer, moves to dismiss the action on the grounds: 1st. That the Court has no jurisdiction of the person of defendant. 2d. That the return of the officer is insufficient to give jurisdiction. *Held*, that the motion was properly denied; that defendant could not thus defeat the whole case in *limine* upon the insufficiencies of the record, though the action might be thus dismissed if the facts were shown to be such that the record could not be amended. *Hamilton v. McDonald*, 18 Cal. 128.

2. In case of a dismissal of an action by a Justice of the Peace for non-appearance of the plaintiff, the judgment for defendant operates as a dissolution of an attachment, although the Justice reinstates the case, and the parties appear and try it. *O'Connor v. Blake*, 27 Cal. 312.

§ 592. Judgment for plaintiff by default.

When the defendant fails to appear and answer, judgment shall be given for the plaintiff, as follows:

1st. When a copy of the account, note, bill, or other obligation upon which the action is brought, was filed with the Justice at the time the summons was issued, judgment shall be given without further evidence, for the sum specified in the summons;

2d. In other cases, the Justice shall hear the evidence of the plaintiff, and render judgment for such only sum as shall appear by the evidence to be just; but in no case exceeding the amount specified in the summons.

1. A judgment by default rendered in a Justice's Court cannot be attacked collaterally as void for want of jurisdiction of the person of the defendant—who was a resident of the county, but not of the township in which the suit was instituted—when there appears in the record a certificate, indorsed on the summons by the officer serving it, and filed with the Justice who acted on it, that the summons was served on the defendant in the township in which suit was commenced. *Fagg v. Clements*, 16 Cal. 389.

2. Such certificate is sufficient, *prima facie*, to establish the jurisdiction of the Justice. The objection to the jurisdiction, that defendant did not reside in the township where suit was brought, should have been taken at the trial; and as defendant failed to appear, the judgment is conclusive. *Id.*

3. Where a summons was issued and served in the morning, by which the defendants were cited to appear and answer the complaint in the Court of First Instance, at ten o'clock, and judgment was rendered against them at nine o'clock in the morning of the same day: *Held*, that the judgment was irregular, and should be reversed; notwithstanding the Court offered them permission to come in at a subsequent day and make their defense. *Parker v. Shepard*, 1 Cal. 131.

§ 593. Upon issue joined, the Justice shall try the cause and render judgment.

Upon issue joined, if a jury trial be not demanded, the

Justice shall hear the evidence, and decide all questions of fact and of law, and render judgment accordingly.

§ 594. *Entry of judgment, time and manner of.*

Upon a verdict, the Justice shall immediately render judgment accordingly. When the trial is by the Justice, judgment shall be entered immediately after the close of the trial, if the defendant has been arrested and is still in custody; in other cases it shall be entered within four days after the close of the trial. If the action be on a contract against two or more defendants, and the summons is served on one or more, but not on all, the judgment shall be entered up only against those who were served, or have voluntarily appeared, if the contract be a several or a joint and several contract; but if the contract be a joint contract only, the judgment shall be entered up against all the defendants, but shall only be enforced against the joint property of all, and the individual property of the defendants served, or who have voluntarily appeared in the action. In an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein.

Amended 1854, 97; 1863, 690.

1. When the contract sued on is a joint contract of two defendants, and judgment is entered up against one only, it is not such error as renders the judgment void, so that it can be attacked in a collateral proceeding. *Seaver v. Fitzgerald*, 32 Cal. 86.

2. A Justice's Court is not a Court of record; it is an inferior Court, and its jurisdiction must be shown affirmatively by a party relying upon or claiming any right under its judgments; but parol evidence is admissible to show that the defendant was within its jurisdiction. *Jolley v. Foltz*, Oct. T. 1867.

§ 595. *If the sum found due exceed the jurisdiction of the Justice, the excess may be remitted.*

When the amount found due to either party exceeds the sum for which the Justice is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

§ 596. *Offer to compromise before trial.*

If the defendant at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he shall not recover costs, but costs shall be adjudged against him, and if he recover, deducted from his recovery. But the offer and failure to accept it shall not be given in evidence to affect the recovery otherwise than as to costs, as above provided.

§ 597. *Judgment when the defendant is under arrest.*

When a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, it shall be so stated in the judgment and entered in the docket.

§ 598. *Costs shall be added to the verdict.*

When the prevailing party is entitled to costs by this chapter, the Justice shall add their amount to the verdict; or in case of a failure of the plaintiff to recover, or in case of a dismissal of the action, shall enter up judgment in favor of the defendant for the amount of such costs.

§ 599. *Execution issued by the Justice, except when it is to judgment liens, how created.*

The Justice, on demand of the party in whose favor judgment is rendered, shall give him a transcript thereof, which may be filed and docketed in the office of the Clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the County Clerk shall be noted by him thereon, and entered in the docket; and from that time executions may be issued by the County Clerk on such judgments to the Sheriff of any other county of the State, in the same manner as upon judgments recovered in the higher Courts. All process upon judgments recovered in Justices' Courts, to be executed within the same county, shall be issued by the Justice or his successors in office. No judgment rendered by a Justice of the Peace shall create any lien upon any lands of the defendant, unless a transcript of such judgment, certified by the Justice, be filed and

recorded in the office of the Recorder. When such transcript is to be filed in any other county than that in which the Justice resides, such transcript shall be accompanied with the certificate of the County Clerk as to the official character of the Justice. When so filed and recorded in the office of the Recorder for any county, such judgment shall constitute a lien upon, and bind the lands and tenements of the judgment debtor, situated in the county where such transcript may be filed and recorded, in favor of such judgment creditor, as if such judgment had been rendered in the District Court of such county.

¹ Amended 1854, 97.

1. Real estate of a judgment debtor, situated in the county where the judgment before the Justice of the Peace was rendered, may be sold on execution upon the judgment, whether a transcript of the judgment be filed in the office of the Recorder of such county or not. *Campbell v. Wickware*, 19 Cal. 145.

2. No filing of such transcript with the Recorder is necessary, except as to property situated in a different county. With reference to property in the same county, the provisions for the enforcement of an execution upon a judgment in a Justices' Court are the same as those relating to District Courts. *Id.*

3. A judgment rendered by a Justice of the Peace does not become a lien on the real estate of the judgment debtor until a copy of the judgment, certified by the Justice, has been recorded in the office of the County Recorder. *Bagley v. Ward*, 27 Cal. 370.

4. The filing and recording in the Recorder's office of the copies of docket entries, made by a Justice of the Peace, does not constitute the judgment a lien on the real estate of the judgment debtor. *Id.*

5. The filing of the transcript of a judgment of a Justice of the Peace with, and the docketing of it by the County Clerk, do not make it a judgment or record of the District Court. *People v. Doe*, 31 Cal. 220.

§ 600. *Execution may issue at any time within five years.*

Execution for the enforcement of a judgment in a Justice's Court, may be issued, on the application of the party entitled thereto, at any time within five years from the entry of judgment.

1. The loss of the docket of the Justice will not prevent the statute from running. *White v. Clark*, 8 Cal. 512.

2. An execution can only be issued upon a judgment obtained before a Justice of the Peace, within five years after the entry of the judgment. In contemplation of the statute, there is no judgment after that time. *Id.*

3. An action will lie on a judgment in a Justice's Court in this State, even when the time within which an execution could be issued on such judgment has expired. *Stuart v. Lander*, 16 Cal. 372.

4. Unless an execution issue within five years, the judgment is void; nor will the loss of the Justice's docket prevent the time from running. *White v. Clark*, 8 Cal. 512.

5. The filing and docketing of a transcript of a judgment rendered by a Justice of the Peace in the office of the clerk of the county, does not empower the clerk of the Court in which it is filed and docketed to issue an

execution on the same after five years have elapsed from the date of its rendition. *Kerns v. Graves*, 26 Cal. 156.

§ 601. *Execution, contents of.*

The execution, when issued by a Justice, shall be directed to the Sheriff or to a Constable of the county, and subscribed by the Justice by whom the judgment was rendered, or by his successor in office, and shall bear date the day of its delivery to the officer to be executed. It shall intelligibly refer to the judgment, by stating the names of the parties, and the name of the Justice before whom, and of the county, and the township, or city where, and the time when it was rendered; the amount of judgment, if it be for money; and if less than the whole is due, the true amount due thereon. It shall contain, in like cases, similar directions to the Sheriff or Constable as required by the provisions of Title VII, of this Act, in an execution to the Sheriff.

1. Under sections six hundred and one and six hundred and two of the Practice Act, a constable may serve an execution out of his township. *Lafontaine v. Greene*, 17 Cal. 394.

§ 602. *Duty of officer receiving execution. Supplementary proceedings.*

The Sheriff or Constable to whom the execution is directed, shall proceed to execute the same in the same manner as the Sheriff is required by the provisions of Title VII, of this Act, to proceed upon executions directed to him; and the Constable, when the execution is directed to him, shall be vested for that purpose with all the powers of the Sheriff, and, after issuing an execution, and either before or after its return, (if the same be returned unsatisfied either in whole or in part), the judgment creditor shall be entitled to an order from the Justice, requiring the judgment debtor to attend at a time to be designated in the order, and answer concerning his property before such Justice, and the attendance of such debtor may be enforced by the Justice. On his attendance, such debtor may be examined under oath concerning his property, and any person alleged to have in his hands property, moneys, effects or credits of the judgment debtor may also be required to attend and be examined, and the Justice may order any

property in the hands of the judgment debtor, or any other person, not exempt from execution, belonging to such debtor, to be applied towards the satisfaction of the judgment; and the Justice may enforce such order by imprisonment until complied with, but no judgment debtor or other person shall be required to attend before the Justice out of the county in which he resides.

¹Amended 1854, 98.

1. Where property is levied on by a constable or sheriff, by virtue of an attachment or execution, as the property of the defendant in the suit, and is claimed by a third party, and a jury is called to try the right of property under the claim, and the verdict of the jury is against the claimant, this verdict is no protection to the officer in suit brought against him by the claimant, nor is it admissible in evidence as a defense. *Sheldon et al. v. Loomis*, 28 Cal. 123.

2. Under sections six hundred and one and six hundred and two of the Practice Act, a constable may serve an execution out of his township. *Lafontaine v. Greene et al.*, 17 Cal. 294.

TITLE LVII.

CHAPTER V.—*General provisions.*

- SUMMONS 603.** The provisions of this act referred to in this title only shall apply to Justices' Courts.
- 604.** Justices' docket, contents of.
- 605.** Entries therein shall be under the title of the action.
The docket shall be primary evidence of the facts it contains.
- 606.** An index to the docket shall be kept.
- 607.** Dockets shall be delivered by the Justice to his successor, or to the county clerk.
- 608.** A Justice may issue execution, or other process, upon the docket of his predecessor.
- 609.** Successor of a Justice, who shall be deemed.
- 610.** If two Justices might be deemed successor, the County Judge shall designate one.
- 611.** Blanks shall be filled in all papers issued by a Justice, except subpoenas.
- 612.** In case of disability of a Justice, another Justice may attend on his behalf.
- 613.** The Justice may depute a person to serve a summons or execution; Justice liable for acts of such deputy.
- 614.** Authority and obligations of deputy.
- 615.** A constable, after the expiration of his term, may execute final process previously commenced.
- 616.** Contempts, a Justice may furnish for.
- 617.** Proceedings and punishment for contempts.
- 618.** The conviction shall be entered in the docket.
- 619.** Justices may issue subpoenas and final process to any part of the county.
- 620.** Provisions of Title XI applicable to Justices' Courts.

- SECTION 621.** Mining claims, actions concerning, shall be governed by the usages of the bar or diggings.
622. A new trial may be granted in certain cases.
623. Application for new trial.
624. Appeals from a judgment of a Justice may be taken to a County Court.
625. Party appealing on questions of law alone shall prepare a statement. Settlement of statement.
626. If the appeal be on questions of fact, or law and fact, no statement need be made.
627. Upon the appeal the Justice shall transmit the case to the County Court.
628. Undertaking on appeal. Justification of sureties.
629. On filing undertaking, execution shall be stayed.
630. Repealed.
631. Costs allowed to prevailing party.
632. Repealed.
633. Money collected by constable or sheriff shall be paid over to the Justice.
634. Justice may require security for costs.
635. Preceding sections applicable to Justices' Courts.

§ 603. *The provisions of this Act referred to in this title only shall be applicable to Justices' Courts.*

Those provisions of this act which are referred to in this title, and no other, shall, in addition to the provisions embraced in this title, be applicable to Justices' Courts and proceedings therein.

¹Amended 1853, 280; 1854, 98.

§ 604. *Justices' docket, contents of.*

Every Justice shall keep a book denominated a "docket," in which he shall enter:

- 1st. The title of every action or proceeding;
- 2d. The object of the action or proceeding, and if a sum of money be claimed, the amount of the demand;
- 3d. The date of the summons, and the time of its return; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of these facts;
- 4th. The time when the parties or either of them appear, or their non-appearance, if default be made; a minute of the pleadings and motions; if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleadings, and of all motions made during the trial by either party, and his decisions thereon;
- 5th. Every adjournment, stating on whose application, whether on oath, evidence, or consent, and to what time;

6th. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the trial and return of the jury ;

7th. The names of the jury, who appear and are sworn, the names of all witnesses sworn, and at whose request ;

8th. The verdict of the jury, and when received ; if the jury disagree and are discharged, the fact of such disagreement and discharge ;

9th. The judgment of the Court, specifying the costs included and the time when rendered ;

10. The issuing of the execution, when issued and to whom, the renewals thereof, if any, and when made, and a statement of any money paid to the Justice, and when and by whom ;

11th. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed.

¹Amended 1855, 1897.

1. The failure of a Justice of the Peace to state in his docket that the summons was returned "served," will not vitiate the judgment on appeal. The fact of service may be shown by the return of the officer on the summons. *Denmark v. Liening*, 10 Cal. 93.

2. The record of the proceedings in a Justice's Court, in which judgment was rendered, must affirmatively show that the suit was brought in the proper township, or the proceedings are *coram non judice* and void; and the failure of defendant, after summons served, to appear and object that suit was brought in the wrong township, is no waiver of the objection. *Love v. Alexander*, 15 Cal. 296.

3. The recital in the docket of a Justice, who had rendered judgment, that the summons was "returned duly served," is of no weight to prove proper service of the summons. The return of the officer is as much a part of the record as the docket itself ; and if the return fail to show sufficient service, the recital being based on the return alone, amounts to nothing more than the opinion of the Justice, and cannot be relied on to give validity to the judgment. *Id.* ; *Rowley v. Howard*, 23 Id. 403.

§ 605. *Entries therein shall be under the title of the action. The docket shall be primary evidence of the facts it contains.*

The several particulars of the last section specified shall be entered under the title of the action to which they relate, and at the time when they occur. Such entries in a Justice's docket, or a transcript thereof, certified by the Justice or his successor in office, shall be primary evidence to prove the facts so stated therein.

1. A Justice's docket is only primary evidence, and its omissions may be supplied from other sources when necessary. *Blair v. Hamilton*, 32 Cal. 49.

§ 606. *An index to the docket shall be kept.*

A Justice shall keep an alphabetical index to his docket in which shall be entered the names of the parties to each judgment, with a reference to the page of entry. The name of the plaintiffs shall be entered in the index, in the alphabetical order of the first letter of the family name.

§ 607. *Dockets shall be delivered by the Justice to his successor, or to the County Clerk.*

It shall be the duty of every Justice of the Peace, upon the expiration of his term of office, to deposit with his successor his official dockets and all papers filed in his office, as well his own as those of his predecessors, or any other which may be in his custody to be kept as public records. If the office of a Justice become vacant by his death or removal from the township or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such Justice shall be deposited in the office of some other Justice in the township, to be by him delivered to the successor of said Justice: and while in his possession, he may issue execution on a judgment there entered and unsatisfied, in the same manner and with the same effect as the Justice by whom the judgment was entered might have done. If there be no other Justice in the township, then the dockets and papers of such Justice shall be deposited in the office of the County Clerk of the county, to be by him delivered to the successor in office of the Justice.

¹ Amended 1863, 232.

§ 608. *A Justice may issue execution, or other process, upon the docket of his predecessor.*

Any Justice with whom the docket of his predecessor is deposited shall have and exercise over all actions and proceedings entered in the docket of his predecessor, the same jurisdiction as if originally commenced before him. In case of the creation of a new county, or the change of the boundary between two counties, any Justice into whose hands the docket of a Justice formerly acting as such within the same territory may come, shall for the purposes of this section, be considered the successor of said former Justice.

¹ Amended 1855, 304 ; 1863, 232.

§ 609. *Successor of a Justice, who shall be deemed.*

The Justice elected to fill a vacancy shall be deemed the successor of the Justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township or city, from that time shall be deemed the suc-

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§ 613. *The Justice may depute a person to serve or subpoena. Justice liable for acts of such depute*

A Justice shall keep an alphabetical index to his docket, in which shall be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs shall be entered in the index, in the alphabetical order of the first letter of the family name.

§ 607. *1Docket, or to the Clerk*

It shall be the duty of every Justice of the Peace, upon the expiration of his term of office, to deposit with his successor his official dockets and all papers filed in his office, as well as his own as those of his predecessors, or any other which may be in his custody to be kept as public records. If the office of a Justice becomes vacant by his death or removal from the township or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such Justice shall be deposited in the office of some other Justice in the township, to be by him delivered to the successor of said Justice; and while in his possession, he may issue execution on a judgment, there entered and unsatisfied, may make all orders in proceedings supplemental to execution, and may file notices and undertakings on appeal, and may take the justification of the sureties, and on the filing of the undertaking on appeal, order stay of execution, in the same manner and with the same effect as the Justice by whom the judgment was entered might have done. If there be no other Justice in the township, then the docket and papers of such Justice shall be deposited in the office of the County Clerk of the county, to be by him delivered to the successor in office of the Justice.

1 Amended 1863,

§ 608. *1A Justice*

Any Justice of the Peace, upon the expiration of his term of office, shall deposit with his successor his official dockets and all papers filed in his office, as well as his own as those of his predecessors, or any other which may be in his custody to be kept as public records.

If the office of a Justice becomes vacant by his death or removal from the township or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such Justice shall be deposited in the office of some other Justice in the township, to be by him delivered to the successor of said Justice; and while in his possession, he may issue execution on a judgment, there entered and unsatisfied, may make all orders in proceedings supplemental to execution, and may file notices and undertakings on appeal, and may take the justification of the sureties, and on the filing of the undertaking on appeal, order stay of execution, in the same manner and with the same effect as the Justice by whom the judgment was entered might have done.

1 Amended

§ 609

An Act to amend an Act entitled "An Act to regulate proceedings in civil cases, in the Courts of Justice of this State," passed April 29th, 1851, and the several Acts amendatory thereof and supplemental thereto. The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section six hundred and seven of the above entitled Act is hereby amended so as to read as follows:

§ 607. It shall be the duty of every Justice of the Peace, upon the expiration of his term of office, to deposit with his successor his official dockets and all papers filed in his office, as well as his own as those of his predecessors, or any other which may be in his custody to be kept as public records. If the office of a Justice becomes vacant by his death or removal from the township or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such Justice shall be deposited in the office of some other Justice in the township, to be by him delivered to the successor of said Justice; and while in his possession, he may issue execution on a judgment, there entered and unsatisfied, may make all orders in proceedings supplemental to execution, and may file notices and undertakings on appeal, and may take the justification of the sureties, and on the filing of the undertaking on appeal, order stay of execution, in the same manner and with the same effect as the Justice by whom the judgment was entered might have done. If there be no other Justice in the township, then the docket and papers of such Justice shall be deposited in the office of the County Clerk of the county, to be by him delivered to the successor in office of the Justice.

SEC. 2. This Act shall take effect and be in force from and after its passage.

[Approved March 9, 1870.]

any Justice into whose hands the docket and papers of such Justice formerly acting as such within the county, shall for the purposes of this section, be deemed the successor of said former Justice.

§ 232.

A Justice, who shall be deemed.

The Justice elected to fill a vacancy shall be deemed the successor of the Justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township or city, from that time shall be deemed the successor.

§ 610. *If two Justices might be deemed successors, the County Judge shall designate one.*

When two or more Justices are equally entitled under the last section to be deemed the successors in office of the Justice, the County Judge shall, by a certificate subscribed by him and filed in the office of the County Clerk, designate which Justice shall be the successor of a Justice going out of office, or whose office has become vacant.

§ 611. *Blanks shall be filled in all papers issued by a Justice, except subpoenas.*

The summons, execution, and every other paper made or issued by a Justice, except a subpoena, shall be filed without a blank left to be filled by another, otherwise it shall be void.

§ 612. *In case of disability of a Justice, another Justice may attend on his behalf.*

In case of the sickness, or other disability, or necessary absence of a Justice on a return of a summons, or at the time appointed for a trial, another Justice of the same township or city may, at his request, attend in his behalf, and shall thereupon become vested with the power, for the time being, of the Justice before whom the summons was returnable. In that case, the proper entry of the proceedings before the attending Justice, subscribed by him, shall be made in the docket of the Justice before whom the summons was returnable. If the case be adjourned, the Justice before whom the summons was returnable may resume jurisdiction.

§ 613. *The Justice may depute a person to serve a summons or subpoena. Justice liable for acts of such deputy.*

The Justice may, at the request of a party, on good cause being shown therefor under oath, but not otherwise, specially depute any discreet and responsible person of suitable age, and not interested in the action, or related to such Justice or party, to serve a summons or execution, with or without an order to arrest the defendant, or with or without a writ of attachment. The said Justice shall be liable on his official bond for all official acts of the person so deputed; such deputation shall be in writing on the process and shall state the reason thereof.

¹Amended 1860, 305; 1865-6, 467.

§ 614. *Authority and obligations of a deputy.*

The person so deputed shall have the authority of a Constable in relation to the service, execution, and return of such process, and shall be subject to the same obligations.

§ 615. *A Constable, after the expiration of his term, may execute papers previously commenced.*

A Constable, notwithstanding the expiration of his term of office, may proceed and complete the execution of all final process which he has begun to execute, in the same manner as if he still continued in office, and his sureties shall be liable to the same extent.

§ 616. *Contempts, a Justice may punish for.*

A Justice may punish as for contempt, persons guilty of the following acts, and no other:

1st. Disorderly, contemptuous, or insolent behavior towards the Justice while holding the Court, tending to interrupt the due course of a trial, or other judicial proceeding;

2d. A breach of the peace, boisterous conduct, or violent disturbance in the presence of the Justice, or in the immediate vicinity of the Court, held by him, tending to interrupt the due course of a trial or other judicial proceeding;

3d. Disobedience or resistance to the execution of a lawful order, or process made or issued by him;

4th. Disobedience to a subpoena duly served, or refusing to be sworn, or answer as a witness;

5th. Rescuing any person or property in the custody of any officer, by virtue of an order or process of the Court held by him.

§ 617. *Proceedings and punishments for contempts.*

When a contempt is committed in the immediate view and presence of the Justice, it may be punished summarily, for which an order shall be made reciting the facts, as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the Justice, a warrant of arrest may be issued by such Justice, on which the person so guilty may be arrested and brought before the Justice immediately, when an opportunity to be heard in his defense or excuse shall be given. The Justice may thereupon discharge him, or may convict him of the offense. A Justice may punish for contempts, by fine or imprisonment, or both; such fine not to exceed in any case one hundred dollars, and such imprisonment one day.

§ 618. *The conviction shall be entered in the docket.*

The conviction specifying particularly the offense and the judgment thereon, shall be entered by the Justice in his docket.

§ 619. *Justices may issue subpoenas and final process to any part of the county.*

Justices of the Peace may issue subpoenas in any action or proceeding in the Courts held by them, and final process, or [on] any judgment recovered therein, to any part of the county. A Justice of the Peace may issue summons to any person, a resident of the proper township, to appear before him, at his office, to act as interpreter in any action or proceeding in the Courts held by him. Such summons shall be served and returned in like manner as a subpoena issued by a Justice. Any person so summoned shall, for a failure to attend at the time and place named in the summons, be

deemed guilty of a contempt, and may be punished accordingly.

¹Amended 1863, 496.

1. Section four hundred of the Practice Act provides that where a Judge trying a cause may be called as a witness, he may order the trial to take place before another Judge; and section six hundred and twenty of the same act extends the like provisions to Courts of Justices of the Peace. *Davis v. Galen*, 2 Cal. 360.

2. Section six hundred and twenty of the Practice Act provides that the provisions of Title XI of that act, so far as consistent with the jurisdiction and powers of Justices' Courts, shall be applicable thereto, and Title XI includes section four hundred and twenty-two. We see nothing in this section, as amended, inconsistent with the jurisdiction and power of these Courts. *Bradley v. Kent*, 22 Cal. 172.

§ 621. *Mining claims, actions concerning, shall be governed by the usages of the bar or diggings.*

In actions respecting "mining claims," proof shall be admitted of the customs, usages, or regulations established and in force at the bar, or diggings, embracing such claim; and such customs, usages, or regulations, when not in conflict with the constitution and laws of this State, shall govern the decision of the action.

1. Mining laws, when introduced in evidence, are to be construed by the Court, and the question whether by such laws a forfeiture had accrued, is a question of law, and cannot, therefore, be properly submitted to a jury. *Fairbank v. Woodhouse*, 6 Cal. 433.

2. Miners have the power to prescribe the rules governing the acquisition and divesture of the titles to this class of claims, and their extent, subject only to the general laws of the State. *English v. Johnson*, 17 Cal. 107.

3. Where a party's rights to a mining claim are fixed by the rules of property, which are a part of the general law of the land, they cannot be divested by any mere neighborhood custom or regulation. *Waring v. Crow*, 11 Cal. 366.

4. *English v. Johnson* (17 Cal.), that the quantity of ground a miner can claim by location or prior appropriation, for mining purposes, may be limited by the mining rules of the district, affirmed. *Prosser v. Parks*, 18 Cal. 47.

5. The fact that mining laws and regulations were passed on a different day from that advertised for a meeting of miners, does not invalidate them. Courts will not inquire into the regularity of the modes in which these local legislatures or primary assemblages act. They must be the judges of their own proceedings. It is sufficient that the miners agree—whether in public meeting or after due notice—upon their local laws, and that these are recognized as the rules of the vicinage, unless fraud be shown or other like cause for rejecting the laws. *Core v. McBrayer*, 18 Cal. 532.

6. The mining rules of the district cannot limit the quantity of ground or the number of claims a party may acquire by purchase. *Prosser v. Parks*, 18 Cal. 47.

7. The act of 1859 (chap. 97) respecting the mines; the Practice Act of 1851 (sec. 621), relative to proof in actions respecting mining claims; the act of 1852, relative to possessory actions, commented on, and the conclusion reached that, so far as they touched the question of a license from the state to mine, they refer to public lands alone. *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279.

8. Where parol evidence is given of certain regulations of miners, and it does not appear until the cross-examination of the witnesses that the regula-

be given in evidence; but a local custom stands upon different footing, and cannot be introduced to affect the validity of a claim acquired previous to its establishment. *Table Mountain Tunnel Co. v. Stranahan*, 20 Cal. 199.

15. A local mining regulation or custom adopted after the location of a claim, cannot be given in evidence to limit the extent of a claim previously located. *Id.*, 31 Cal. 378.

16. Where there are no local customs or regulations in force in the district where a mining claim is located at the time of its location, general customs then in force are admissible in evidence upon the question of the reasonableness of its extent. A general uniform custom should be proved if one exists. *Id.*

17. If the defendants in an action claim that when they took up the ground in dispute, a local custom allowed them three hundred feet front to each man, and that they located to that extent, they are estopped from asserting that the plaintiff's location to the same amount, made before the adoption of the custom, was unreasonable in size. *Id.*

18. If there is no evidence as to the general custom of the size of locating mining claims, instructions to the jury upon the reasonableness of its size, depending on general custom, are irrelevant. *Id.*

19. It is error for the Court to instruct the jury that the statutes provide that the general usages and regulations shall govern the decision of the action. The statute speaks only of local customs. *Id.*

20. Where any local mining customs exist, controversies affecting a mining right must be solved and determined by the customs and usages of the bar or diggings embracing the claim to which such right is asserted or denied, whether such customs and usages are written or unwritten. *Morton v. Solambo C. M. Co.*, 26 Cal. 527.

21. If a mining custom allows a person to locate a lode or vein for himself and others, by placing thereon a notice with his own name and the names of those whom he may choose to associate with him appended thereto, designating the extent of his claim, and one person thus locates a lode for himself and several others, some of whom have no knowledge of the location, the persons who have no knowledge of the location by the same, become

tenants in common with the locator and the others, and cannot be divested of their interest by the locators afterwards tearing down the notice and posting up another, omitting their names, unless this is done with their knowledge and consent. *Id.*

22. A local mining regulation or custom, adopted after the location of a mine, cannot be given in evidence to limit the extent of a claim previously located. *T. M. Tunnel Co. v. Stranahan*, 31 Cal. 387.

23. Where there are no local customs or regulations in force in the District where the mining claim is located at the time of its location, general customs then in force are admissible in evidence upon the question of the reasonableness of its extent. *Id.*

24. Evidence of local usages and customs in different counties in the mineral regions, varying from each other as to the size, of locating a mining claim, is not admissible in evidence to show the reasonableness of its extent, a general uniform custom should be proved if one exists. *Id.*

25. If there is no evidence as to the general custom of the size of locating mining claims, instructions to the jury upon the reasonableness of its size, depending on general customs, are irrelevant. *Id.*

26. It is error for the Court to instruct the jury that the statute provides that general customs, usages and regulations shall govern the decision of the action. The statute speaks only of local customs. *Id.*

§ 622. *A new trial may be granted in certain cases.*

A new trial may be granted by the Justice, on motion, within ten days after the entry of the judgment, for any one of the following causes:

1st. Accident or surprise, which ordinary prudence could not have guarded against.

2d. Excessive damages, appearing to have been given under the influence of passion; or,

3d. Insufficiency of the evidence to justify the verdict or other decision.

4th. Newly discovered evidence material for the party making the application, which he could not with reasonable diligence have discovered and produced at the time.

§ 623. *Application for a new trial.*

The application shall be made upon affidavit and notice. The affidavit shall be filed with the Justice, with a statement of the grounds upon which the party intends to rely. The adverse party may use counter affidavits on the motion, provided they be filed one day previous to the hearing of the motion.

§ 624. *Appeal from a judgment of a Justice may be taken to the County Court.*

Any party dissatisfied with a judgment rendered in a Justice's Court, may appeal therefrom to the County Court of

the county [at] any time within thirty days after the rendition of the judgment; the appeal shall be taken by filing a notice of appeal with the Justice, and serving a copy on the adverse party. The notice shall state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact, or both.

¹Amended 1853, 280; 1854, 98. See *ante*, §§ 366-367.

1. On appeal from a Justice's to a County Court—the record not showing that notice of appeal had been served on the adverse party—appellant may prove by his affidavit that such notice was in fact served. *Mendiocca v. Orr*, 16 Cal. 368.

2. The general rule regulating appeals, which provides that notice may be served on the party or his attorney, must govern cases arising in Justices' Courts. *Wellon v. Garibaldi*, 6 Cal. 245.

3. A Justice of the Peace has jurisdiction to grant appeals and to stay proceedings thereupon; and his action cannot be reviewed on *certiorari*. *Coulter v. Stark*, 7 Cal. 245.

4. Under the Constitution, before the amendments which went into effect January 1st, 1864, an appeal could be taken to the Supreme Court from a judgment of the County Court, when the judgment appealed from, including principal and interest, exceeded two hundred dollars. *Malson v. Vaughn*, 23 Cal. 61.

5. One of the conditions upon which an appeal is allowed from a Justice's Court, is payment of costs. *McDermott v. Douglass*, 5 Cal. 89.

6. An appeal does not lie to the County Court from an order made by a Justice of the Peace, directing property alleged to have been stolen, and discovered and brought before the Justice by a peace officer, by virtue of a search warrant issued by the Justice, to be delivered to the owner. *People v. Holloway*, 26 Cal. 651.

7. An appeal to the County Court lies from a judgment rendered in a Justice's Court, in an action brought to recover the penalty for an overcharge, pursuant to the provisions of the act of the 14th of April, 1863, concerning street railroads in this State. *Burson v. Cowles*, 25 Cal. 535.

8. A notice of appeal from a judgment rendered in a Justice's Court to the County Court, in an action of forcible entry and detainer, is not invalidated because it contains a clause that the "appeal is taken on questions of law alone." *Zoller v. McDonald*, 23 Cal. 136.

§ 625. *1*Party appealing on questions of law alone shall prepare a statement. *Settlement of statement.*

When a party appeals to the County Court on questions of law alone, he shall, within ten days from the rendition of judgment, prepare a statement of the case and file the same with the Justice. The statement shall contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more; within ten days after he receives notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments; the proposed statement and amendments shall be settled by the Justice,

and if no amendments be filed, the original statement shall be adopted. The statement thus adopted or as settled by the Justice, with a copy of the docket of the Justice, and all motions filed with him by the parties during the trial, and the notice of appeal shall be used on the hearing of the appeal before the County Court.

¹Amended 1853, 280; 1854, 99; 1855, 198.

1. On appeal from a Justice's Court to a County Court, on questions of law alone, if a new trial be ordered, it should take place in the County Court. *People v. Freelon*, 8 Cal. 518.

§ 626. *¹If the appeal be upon questions of fact, or of law and fact, no statement need be made.*

When a party appeals to the County Court on questions of fact, or on questions of both law and fact, no statement need be made, but the action shall be tried anew in the County Court.

¹Amended 1853, 280; 1854, 99.

1. A defendant, who has been properly served with process issued out of a Justice's Court, who allows judgment to be taken against him by default, admits the facts alleged in the complaint, and no appeal will lie from such judgment in reference to such facts, there being no issue of facts. *The People ex rel. Jones v. The County Court of El Dorado County*, 10 Cal. 19.

2. In such a case, where the defendant appeals on questions of both law and fact, he is not entitled to a trial *de novo*. *Id.*

3. In all cases the issue of fact must be made in the Court of original jurisdiction. The County Court can only retry the issue tried in the Court below. This is what is meant by a trial anew in the County Court, under section six hundred and twenty-six of the Practice Act. *Id.*

§ 627. *¹Upon the appeal, the Justice shall transmit the case to the County Court.*

¹Upon receiving the notice of appeal and on payment of the fees of the Justice and filing an undertaking as required in the next section, the Justice shall within five days transmit to the Clerk of the County Court; if the appeal be on questions of law alone, a certified copy of his docket, the statement as admitted or as settled, the notice of appeal and the undertaking filed; or, if the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions and other papers filed in the cause, the notice of appeal and the undertaking filed, and the Justice may be compelled by the County Court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same; a certified copy of such order may be

served on the Justice by the party or his attorney. In the County Court either party shall have the benefit of all legal objections made in the Justice's Court.

¹Amended 1853, 280; 1854, 99; 1855, 198.

1. Where a party appealed from a Justice's Court to a County Court, and the Justice neglected to send up with the record the notice of appeal: *Held*, that it was error to refuse to allow appellant the opportunity of moving to compel the Justice to send it up, by peremptorily dismissing the appeal. *Sherman v. Rolberg*, 9 Cal. 17.

2. Even were this not the case, when such an omission occurs, leave should be granted to file a good bond. *Billings v. Roadhouse*, 5 Cal. 71.

3. The omission of the words "to pay to" will not invalidate the obligation of an appeal bond. *Id.*

4. It is always within the power of a Court, when exercising proper discretion, to extend the time fixed by law, whenever the ends of justice would seem to demand such an extension. *Wood v. Forbes et al.*, 5 Cal. 62.

5. A Justice of the Peace may refuse to send up the transcript of a cause tried before him, until his fees are paid by appellant; but if he sends it up without receiving his fees, the fact that they are not paid is no ground for dismissing the appeal. *Bray v. Redman*, 6 Cal. 287.

6. An offer to pay the Justice his costs on appeal, so soon as the appeal papers are ready to transmit to the County Court, is not a sufficient tender, under the statute. The fees must be tendered unconditionally. *People ex rel. v. Harris*, 9 Cal. 571.

7. The Justice is not bound first to make out the papers, and then rely on his fees being afterward paid. *Id.*

8. An appeal is made by filing and serving the notice of appeal. Both requisites must exist to complete the appeal. A failure to notify the adverse party is fatal. *Whipley v. Mills*, 9 Cal. 641.

9. One of the conditions upon which an appeal is allowed from Justices' Courts, is the payment of the costs of the action. *McDermott v. Douglas*, 5 Cal. 89.

10. Where the appeal is taken on questions of law alone, the Justice sends up a statement with a copy of this docket and all motions filed by the parties during the trial, the notice of appeal and the undertaking on appeal. But when the appeal is on questions of fact, or both of law and fact, he sends up no statement. The statement must contain the grounds upon which the parties intend to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds and no more. *People v. Freedom*, 8 Cal. 517.

§ 628. ¹Undertaking on appeal. Justification of sureties.

An appeal from a Justice's Court shall not be effectual for any purpose, unless an undertaking be filed, with two or more sureties, in the sum of one hundred dollars, for the payment of the costs on the appeal; or, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money; or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property, and shall be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and

all costs that may be recovered against him in the said action in the County Court. When the action is for the recovery of specific personal property, the undertaking shall be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the Court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the County Court, and will obey any order made by the Court therein. The undertaking shall be accompanied by the affidavits of the sureties that they are residents of the county, and are each worth the amount specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; or the bond shall be executed by a sufficient number of sureties who can justify, in the aggregate, to an amount equal to double the amount specified in the bond, or a deposit of the amount of the judgment, including all costs appealed from, or of the value of the property, including all costs in actions for the recovery of specific personal property, with the Justice. And such deposit shall be equivalent to the filing of the undertaking in this Act mentioned; and in such cases the Justice shall transmit the money to the Clerk of the County Court, to be by him paid out on the order of the Court. The adverse party may, however, except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the Justice before whom the appeal is taken, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal shall be regarded as if no such undertaking had been given.*

¹ Amended 1853, 280; 1854, 99; 1855, 198; 1860, 305.

* STATUTES OF 1854, 26.

An Act Concerning Appeals in certain Cases.

SECTION 1. When judgment has been rendered in the Court of a Justice of the Peace, in a County Court, a District Court, or the Superior Court of the City of San Francisco, against any organized or incorporated city or town in this State, said city or town, or county, against which such judgment was rendered may appeal therefrom to any Court of competent jurisdiction, by filing a notice of appeal with the said Justice of the Peace, or clerk of either of the other Courts as above mentioned, and serving a copy thereof on the opposite party or his attorney, within the time and manner provided for appeals in other cases; and said appeals shall be effectual for all purposes, and shall operate as a supersedeas to any execution that has been or may be issued on said judgment without the filing of a bond or the payment of costs to the Justice or other Courts, by the said city, or town, or county so appealing.

SECTION 2. The Mayor, Attorney, or Chief Officer of any city, or District Attorney, or the President of the Board of Supervisors of any county, shall have power to give the notice herein required to be given, and to perfect such appeal on behalf of their respective corporations or counties.

1. Superior Court of the city of San Francisco was abolished March 30th, 1857.

2. It is the duty of a Justice of the Peace, when an appeal bond is presented to him for his approval, to act promptly. If he receives the bond without objection, it will be too late to disapprove it the next day. *People v. Harris*, 9 Cal. 571.

3. A party who excepts to the sufficiency of sureties on an appeal bond, may waive their justification. *Blair v. Hamilton*, 32 Cal. 50.

4. If the sureties on an appeal bond are excepted to and appear before the Justice to justify, and the party excepting then states before the Justice that he knows the sureties to be good, and only excepted because his attorney told him to do so, this is a waiver of justification. *Id.*

§ 629. *On filing undertaking, execution shall be stayed.*

If an execution be issued, on the filing of the undertaking staying all proceedings, the Justice shall, by order, direct the officer to stay all proceedings on the same. Such officer shall, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon, and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof, as may be necessary to pay the same.

1. A Justice of the Peace has jurisdiction to grant appeals, and to stay proceedings thereupon; and his action cannot be reviewed on *certiorari*. *Coulter v. Stark*, 7 Cal. 244.

§ 630. Amended 1853, 281; repealed 1854, 100.

§ 631. *Costs allowed to prevailing party.*

Costs shall be allowed to the prevailing party in a Justice's Court.

¹Amended 1854, 100; 1855, 251.

§ 632. Amended 1854, 100; repealed 1855, 250.

§ 633. *Money collected by Constable or Sheriff shall be paid over to the Justice.*

Justices of the Peace shall receive from the Sheriff or Constables of their county, all moneys collected on any process or order issued by their Courts respectively, and all moneys paid to them in their official capacity, and shall pay the same over to the parties entitled or authorized to receive them, without delay. For a violation of this section, they may be removed from their office, and shall be deemed guilty of a misdemeanor.

1. The clause making the plaintiff in the action a competent witness in his own behalf, in no respect can be said to effect the mode of procedure; but if it did, it would not distinguish it from the mode adopted in other civil actions, for the same provisions existed in the Practice Act at the time the Act in question became law. The same is true of the clause which directs the distribution and payment of the judgment when collected. (Section 633 of the Practice Act.) *Burson v. Cowles*, 25 Cal. 538.

§ 634. *Justice may require security for costs.*

Justices of the Peace may, in all cases, require a deposit of money, or an undertaking, as security for costs of Court, before issuing a summons.

1. The statute which declares that "any officer may refuse to perform any services in a civil action or proceeding until the fee for such service is paid, is not to be construed as prohibiting the officer from performing the service without payment of fees, but as permissive merely, leaving the alternatives of cash in advance or credit, to his own election. *Lick v. Madden*, 25 Cal. 203.

2. If where the services are demanded of an officer in a civil case, he fails to demand his fee in advance, his obligation to perform the duty required is the same as it would be if the fees were prepaid or tendered in advance. *Id.*

§ 635. *Preceding sections applicable to Justices' Courts.*

The provisions of section thirty-two, three hundred and sixty-eight, three hundred and sixty-nine, three hundred and seventy, three hundred and seventy-one, three hundred and seventy-two, three hundred and seventy-three, five hundred and nineteen, five hundred and twenty, five hundred and twenty-three, five hundred and twenty-five, five hundred and twenty-six, five hundred and twenty-seven, five hundred and thirty-one, five hundred and thirty-two, shall be applicable to Justices' Courts and actions therein.

¹Amended 1860, 306.

TITLE LVIII.

PROCEEDINGS IN CIVIL CASES IN RECORDERS' AND MAYORS' COURTS.

SECTION 636. Complaint, contents of. Must be verified.

637. Summons shall issue on filing complaint, returnable in not less than four days.

638. Defendant may plead orally or in writing.

639. Trial by jury, when defendant is entitled to.

640. Appeals may be taken to the County Court.

641. Proceedings shall be conducted as in actions in Justices' Courts.

642. This title applicable to Mayors' and Recorders' Courts.

§ 636. *Complaint, contents of. Must be verified.*

Civil actions in Recorders' and Mayors' Courts shall be commenced by filing the complaint, setting forth the violation of the ordinance complained of, with such particulars of time, place, and manner of violation, as to enable the defendant to understand distinctly the character of the violation complained of, and to answer the complaint. The ordinance may be referred to by its title. The complaint shall be verified by the oath of the party complaining, or of his attorney or agent.

§ 637. *Summons shall issue on filing complaint, returnable in not less than four days.*

Immediately after filing the complaint, a summons shall be issued, directed to the defendant, and returnable either immediately, or at any time designated therein, not exceeding four days from the date of its issuance.

§ 638. *Defendant may plead orally or in writing.*

On the return of the summons, the defendant may plead to the complaint, or he may answer or deny the same. Such plea, answer, or denial, may be oral or in writing, and immediately thereafter the case shall be tried, unless for good cause shown, an adjournment be granted.

§ 639. *Trial by jury, when defendant is entitled to.*

In all actions for violation of an ordinance, where the fine, forfeiture, or penalty imposed by the ordinance, is less than fifty dollars, the trial shall be by the Court. In actions where the fine, forfeiture, or penalty imposed by the ordinance, is over fifty dollars, the defendant shall be entitled, if demanded by him, to a jury of six persons.

§ 640. *Appeals may be taken to the County Court.*

From a judgment in a civil action in a Recorder's or Mayor's Court, an appeal may be taken to the County Court. The appeal shall be taken and the proceedings thereon conducted in the same manner as appeals are taken from a judgment in a civil action in a Justice's Court, and as the proceedings thereon are conducted.

§ 641. *Proceedings shall be conducted as in Justices' Courts.*

All proceedings in civil actions in Recorders' and Mayor's Courts, except as herein otherwise provided, shall be conducted in the same manner as in civil actions in Justices' Courts.

642. *This title applicable to Mayors' and Recorders' Courts.*

The provisions of this title shall be applicable to civil actions in Recorders' and Mayors' Courts already established, or which may hereafter be established in any incorporated city of this State.

TITLE LVIX.

MISCELLANEOUS PROVISIONS.

SECTION 643. Supreme Court may make rules for itself and District Courts.

644. County clerk, what Courts clerk of.

645. Actions against a sheriff for official acts.

646. Actions may be prosecuted in the Spanish language in certain counties.

647. Use and definition of certain words as used in this act.

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666. Repealing certain laws, and reviving others.

667. When supplementary act to take effect.

§ 643. *Supreme Court may make rules for itself and the District Courts.*

The Supreme Court may make rules not inconsistent with the Constitution and laws of the State, for its own Government, and the Government of the District Courts and the Superior Court of the City of San Francisco; but such rules shall not be in force until thirty days after their adoption and publication.

1. The Superior Court of the city of San Francisco abolished May 1st, 1857

§ 644. *Formerly Clerk what Courts Clerk of*

An Act to regulate Practice in the Supreme Court. Approved March 16, 1872.

§ 1. Every civil cause on appeal in the Supreme Court must be decided, and the decision of the Court filed within six months after the same is submitted; if not so decided, and the decision filed, the cause may, on notice of either party, of at least thirty days, to the adverse party, be again placed on the calendar for a re-argument.

§ 2. Every cause which shall have been pending on appeal in said Court, for a period of six months prior to the taking effect of this Act, and shall have been submitted, shall, on notice filed and served, by either party on the adverse party and the Clerk of the Court, thirty days before the commencement of the next succeeding term, be placed on the calendar for that term for re-argument.

If an action is brought against a Sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties; and the Court or Judge in vacation may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs.

1. If a sheriff is indemnified for an act done by virtue of his office, and an action is brought against him to recover damages for the act, and judgment is recovered against him, the sheriff cannot afterwards have judgment against the sureties on the indemnifying bond upon a notice of five days, unless he gave the sureties written notice of the action brought against him. *Dennis v. Packard*, 28 Cal. 101.

2. A bond to indemnify a sheriff takes effect from the time of its delivery. *Buffendeau v. Brooks*, 28 Cal. 641.

3. The provision of the Practice Act making the judgment, in an action against a sheriff, conclusive evidence against his indemnifier, where the latter has been notified of the action, is founded upon the principle that the action, under such circumstances, is in substance against the indemnifier, the real party in interest, and that he has in that action an opportunity to make any defense that may exist. *Dutil v. Pacheco*, 21 Cal. 438.

4. Where, therefore, the indemnifier has been notified of the action against the sheriff, he cannot maintain a bill in equity to set aside the judgment obtained therein, except under such conditions as would have enabled him to maintain it had he been the nominal as well as real party defendant to the first action. *Id.*

§ 646. *Actions may be prosecuted in the Spanish language in certain counties.*

In the counties of Monterey, San Luis Obispo, Santa Barbara, Los Angeles and San Diego, it shall be the duty of the officer to give the defendant, in a civil action, if said defendant shall require it, a copy of the summons or other process in the Spanish language; and in the counties of Santa Barbara, San Luis Obispo, Los Angeles, San Diego, and Monterey, it shall be lawful, with the consent of both parties, to have the process, pleadings, and other proceedings in a cause, in the Spanish language.

¹Amended 1857, 1862, 567.

§ 647. *Use and definition of certain words used in this Act.*

Words used in this Act in the present tense, shall be deemed to include the future as well as the present; words used in the singular number shall be deemed to include the plural, and the plural the singular; writing shall be deemed to include printing or printed paper; oath to include affirmation or declaration; signature or subscription to include mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name, as a witness.

§ 648. *Certain Acts repealed.*

The following statutes, namely: the Act entitled "An Act to Regulate Proceedings in Civil Cases in the District Court, the Superior Court of the city of San Francisco, and the Supreme Court," passed April twenty-second, eighteen hundred and fifty; the Act entitled "An Act to Regulate Proceedings against Debtors by Attachment," passed April twenty-second, eighteen hundred and fifty; the Act entitled "An Act providing for the Collection of Demands against Vessels and Boats," passed April tenth, eighteen hundred and fifty; the Act entitled "An Act to Regulate Proceedings in Courts of Justices of the Peace in Civil Cases," passed April

tenth, eighteen hundred and fifty; and the Act entitled "An Act to Regulate Proceedings in the County Courts in Cases of Appeal from the Courts of Justices of the Peace," passed April eleventh, eighteen hundred and fifty; the Act entitled "An Act respecting Set-offs," passed [April] twenty-second, eighteen hundred and fifty, are hereby repealed; but such repeal shall not invalidate any judgment rendered, or order made, or any proceeding already taken by virtue of said statutes.

§ 649. *When this Act to take effect.*

This Act shall take effect on the first day of July, of the present year.

1. The following sections, from six hundred and fifty to six hundred and fifty-seven, are supplementary provisions, enacted in "An Act amendatory of, and supplementary to, an Act entitled an Act to Regulate Proceedings in Civil Cases in the Courts of Justice of this State." Passed May 15th, 1854.

§ 650. *Undertakings mentioned in this Act, requisites of.*

In all cases where an undertaking with sureties required by the provisions of said Act, the Judge, Justice, Clerk, or other officer taking the same, shall require the sureties to accompany the same with an affidavit that they are each worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; provided, that when the amount specified in the undertaking exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties.

¹Amended 1854, 101. See § 64.

1. The affidavit is sufficient, if, when fairly construed, it comply with the statute. *Thaffe v. Rosenthal*, 7 Cal. 514.

2. Where a mere defective undertaking has been *bona fide* given, and the party will file a good one before the case is submitted, the Court should permit him to do so. *Coulter v. Stark*, 7 Cal. 244; *Bryan v. Berry*, Id. 130; *Cunningham v. Hopkins*, 8 Id. 33.

3. If an undertaking has been executed by the plaintiff, and is executed to the defendant by a wrong name, the latter has his remedy and may describe it as given to him, and may show that he was the party intended. *Morgan v. Thrift*, 2 Cal. 563.

4. Taking all our statutes together, the obvious design was to put an undertaking on the same footing as a bond. *Canfield v. Bates*, 13 Cal. 606.

5. In an action on a bond or written undertaking, there can be no constructive parties jointly liable with the proper obligors. *Lindsay v. Flint*, 4 Cal. 88.

§ 651. *Receivers in actions respecting mining claims.*

In actions respecting miners' claims, in a Justice's Court, the Justice shall have power upon application of the party out of possession of the claim or claims, after notice of one day to the adverse party, to appoint a receiver of the proceeds of the claim, pending the action. If the parties agree upon a person, he shall be appointed such receiver; if the parties do not agree, the Justice shall appoint a receiver, who shall take an oath, which shall be filed with the Justice, that he is not interested in the action between the parties, and that he will honestly keep an account of all gold dust or metals of any kind, the proceeds of the claim or claims in dispute. After the appointment of such receiver, the Justice shall have power to issue a written order to any Sheriff or Constable, to put such receiver into possession of such claim, which order said Sheriff or Constable shall execute, and the receiver shall remain in possession of the claim or claims, so long as said action may remain undetermined in any Court. The Court in which the action may be pending, shall have authority, upon the application of either party, with two days' notice to the other, from time to time, to make such orders for the disposition of the proceeds of such claim or claims, for the safety of the same, as may seem proper. The Court in which the action may be pending, shall also have power, upon application of the receiver, based upon his affidavit, to punish as for contempt, all persons who have been guilty of disturbing the receiver in the possession of the claims.

¹Amended 1854, § 63, p. 101; 1855, 199. See § 143 and notes.

§ 652. *Receivers, duties of.*

The receiver mentioned in the last section, shall keep an accurate account of all the proceeds of the claim pending action, and of all amounts paid out for working the same, and shall retain the proceeds, and pay the same over pursuant to the order of the Court. The receiver shall also be required, on demand of either party, to give security for

the faithful performance of his trust, and shall be allowed for the same a reasonable compensation, to be paid out of the proceeds of the claim in his hands; but in no case exceeding ten per cent. upon such proceeds.

¹Amended 1854, § 64, p. 101.

§ 653. ¹*Writs of certiorari and mandamus, who may issue. Hearing may be in vacation.*

Writs of *certiorari* and *mandamus* may be issued in the cases prescribed by said Act by a Judge of the Supreme Court, District Court, or County Court, in vacations, and may, in the discretion of the Judge issuing the writ, be made returnable, and a hearing may be had on the return thereof in vacation.

¹Amended 1854, § 65, p. 101.

§ 654. ¹*Property attached may be sold as under execution, if the interests of the parties require.*

Whenever property has been taken by an officer under a writ of attachment, in pursuance of the provisions of said act, and it shall be made to appear satisfactorily to the Court, or a Judge thereof, or a County Judge, that the interest of the parties to the action will be subserved by a sale thereof, the Court or Judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the Court, to abide the judgment in the action. Such order shall be made only upon notice to the adverse party or his attorney, in case such party have been personally served with a summons in the action.

¹Amended 1854, § 66, p. ⁷²~~221~~. See §§ 130, 221.

§ 655. ¹*Certified copies of certain papers may be admitted as evidence.*

A copy of any record, document, or paper in custody of a public officer of this State, or of the United States, within this State, certified under the official seal, or verified by the oath of such officer, to be a true, full and correct copy of the original in his custody, may be read in evidence in an action

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or proceeding in the Courts of this State, in the like manner and with the like effect, as the original could be if produced.

¹Amended 1854, § 68, p. 102. See §§ 448, 499.

1. A sworn copy or exemplification of instruments in the archives of the Government is evidence, and the originals ought not to be removed from the Government offices. *Gregory v. McPherson*, 13 Cal. 574.

2. A certified copy of a deed from the county recorder's office, contained in the margin of the acknowledgement taken before a notary, and in the place where his seal is usually found, the words ["No Seal"]—the conclusion of the acknowledgement being, "In witness whereof I have hereunto set my hand and affixed my official seal," etc. The Court below ruled out the copy of the deed as evidence, on the ground that the acknowledgement did not have the notary's seal. *Held*, that the Court erred; that the words ["No Seal"] instead of implying that there was no seal affixed, were a mere note by the recorder of the place of the notarial seal, which he probably had no means of copying. *Jones v. Martin*, 16 Cal. 166. [See *Donner v. Palmer*, and cases there cited, 31 Cal. 500.]

§ 656. *Partners may be sued by their common name.*

When two or more persons associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates, but the judgment in such case shall bind only the joint property of the associates.

1. If, in a complaint against a company by its company name, under the six hundred and fifty-sixth section of the Practice Act, there is an entire absence of any statement showing the existence of the conditions named in the section, and judgment is rendered against the company by default, is the judgment void, or are the conditions matters to be pleaded in abatement, and if not thus pleaded, waived? *Welch v. Kirkpatrick*, 30 Cal. 202.

2. If a complaint in an action against a company by its company states substantially the conditions mentioned in the six hundred and fifty-sixth section of the Practice Act, and the sheriff returns that he has served the summons on one of the members of the company, and judgment by default is entered up against the company by its name, to be enforced against the joint property of the members, the judgment is not void, but may be enforced by execution against the company property. *Id.*

3. Such judgment is not a judgment against the person served with process, but against the company. A complaint which contains no other designation of the party plaintiff than the name of a copartnership firm, is defective; but such defect can only be made available to defendant by demurrer for defect of parties, or by denial in the answer of any cause of action and objection thereunder to evidence in support of the claim. *Gilman & Co. v. Coogrove*, 22 Cal. 356.

§ 657. *Decisions on appeal shall be given in writing.*

All decisions given upon an appeal, in any appellate Court of this State, shall be given in writing, with the reason therefor, and filed with the Clerk of the Court, but this sec-

tion shall not apply to actions tried with a jury anew in the County Court, or on appeal from a Justice's Court.

¹ Amended 1854, § 69, p. 102.

1. A decision of the Court is its judgment; the opinion is the reasons given for that judgment. The former being entered on record immediately, can only be changed upon a petition for rehearing or a modification. The latter is the property of the judges, subject to their revision, correction and modification, until it is transcribed on the record with the consent of the writer, when it ceases to be subject of change, except through regular proceedings before the Court by petition. *Houston v. Williams*, 13 Cal. 23.

2. The practice of giving the reasons in writing for judgments is of modern origin. And it is discretionary with the Court whether it give an opinion upon pronouncing judgment, and if given, whether it be oral or in writing. *Id.*

3. The Legislature cannot require the Supreme Court to give the reasons of its decisions in writing. The Constitutional duty of the Court is discharged by the rendition of its decisions. *Id.*

§ 658. ¹*Of disclaimer before answer and interpleader.*

A defendant against whom an action is pending upon a contract, or for specific personal property, may at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract, or for the same property, upon due notice to such person, and the adverse party, apply to the Court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in Court the amount claimed on the contract, or delivering the property or its value to such person as the Court may direct, and the Court may, in its discretion, make the order.

¹ Amended 1854, § 70, p. 102.

1. Where a tenant finds that there are claimants to the property, he should file a bill of interpleader, making all the adverse claimants parties thereto, and offer to pay the rents into Court, to abide the ultimate decision of the case. *McDevitt v. Sullivan*, 8 Cal. 592.

§ 659. ¹*Intervention, who may make. Definition of.*

Any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant.

¹ Amended 1854, § 71, p. 102.

1. The sixteenth and seventeenth sections of the Practice Act, and the seventy-second, seventy-third and seventy-fourth sections of the amendments of 1854 to the Practice Act, give a party the right to intervene in an action in case of the transfer of any interest during the pendency thereof, or when he is directly interested in the subject matter in litigation, and this can be done either before or after issue has been joined in the case. *Brooks v. Hager*, 5 Cal. 281.

2. The interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. It must be that created by a claim to the demand, or some part thereof, in suit or a claim to or lien upon the property, or some part thereof, which is the subject of litigation. *Horn v. The Volcano Water Co.*, 13 Cal. 62.

3. A simple contract creditor of a common debtor cannot intervene in a foreclosure suit. But judgment creditors, being as such subsequent incumbrancers, may intervene; and a Court may order them to be made parties, probably by an amendment of the complaint as the better course, or on petition of intervention. *Id.*

4. In suit on a note and mortgage, where creditors of the defendant intervened, alleging the note and mortgage to be fraudulent as against them, the intervenors cannot prevent a judgment for plaintiff against defendant. The most they can claim is protection against the enforcement of the judgment to their prejudice. *Id.*

5. In an action to foreclose a mortgage upon property claimed as a homestead, the wife should be allowed to intervene. *Sargent v. Wilson*, 5 Cal. 504; *Moses v. Warner*, 10 Id. 296; *Dillon v. Byrne*, 5 Id. 456.

6. In an attachment suit, judgment creditors of defendant may intervene to set aside the attachment because void as to them. *Davis v. Eppinger*, 18 Cal. 378.

7. Subsequent attachment creditors may intervene in a suit of the prior attachment creditor and the common debtor, when they allege that there is nothing due to said first creditor, and that his object is to hinder, delay and defraud his creditors. *M. Speyer v. Ihmels & Co.*, Jan. 1862.

8. The intervenors become defendants, and as they allege that the plaintiff is not entitled to recover, it amounts to a denial of the facts set forth in the complaint, and consequently the *onus probandi* is on the plaintiff; and if he fails to prove his case, even though the real defendants have made default, judgment will be given in favor of the intervenors against him, and in his favor against the real defendants. *Id.*

9. A. & Co. having on general deposit with B. & Co. \$75,000, a tax for county purposes was levied thereon, and payment demanded of both A. & Co. and B. & Co.: *Held*, that the tax was legal, and that the county might intervene in an action concerning the money, to recover said tax. *Yuba Co. v. Adams*, 1 Cal. 37.

10. The petition of an intervenor must be treated as a declaration or complaint. *People v. Talmage*, 6 Cal. 256.

11. On intervention, if the proceedings between the debtor and a prior creditor are not void, but voidable, the defendant can alone object. *Dacey v. Pollock*, 8 Cal. 570.

12. In a suit to enforce a mechanic's lien on a ditch, a mortgagor of the ditch subsequent to the lien has no absolute right of intervention. And, when the suit had been pending some time, and the application to intervene was made just as plaintiff was taking judgment, the application was properly refused. *Hocker v. Kelley*, 14 Cal. 164.

13. The filing of an intervention in an action to foreclose a mechanic's lien within the prescribed statutory time, and becoming parties to the suit, during the existence of the lien, is the same as commencing an original action. *Mars v. McKay*, 14 Cal. 127.

14. It is too late on appeal to object that certain parties could not intervene in a suit pending in the inferior Court. *McKenty v. Gladwin*, 10 Cal. 227.

15. Where one tenant in common sues to recover possession of the premises, and the damages sustained by the ouster, his co-tenants cannot intervene. *Donner v. Palmer, Bradley, Intervenor*, Oct. T. 1867.

16. Where a subsequent attaching creditor has his attachment levied on the property previously levied on by a prior attaching creditor, he is entitled to intervene in the action between the first attaching creditor and the defendant, if the first attachment was fraudulently procured, and the common debtor has not sufficient property to pay both claims. *Coghill & Co. v. Marks*, 29 Cal. 673.

17. In an action to recover money in which an attachment has been issued and levied upon property of the defendant, a subsequent attaching creditor may intervene at any time before the entry of judgment for the purpose of contesting the validity of the first attachment. *Speyer v. Ihmels*, 21 Cal. 280.

18. If the owner of a claim assigns it absolutely, retaining, however, an interest in it, he may intervene to protect his interest in an action brought by the assignee to collect the same, and if he does not intervene, he is bound by the judgment. *Gradwohl v. Harris*, 29 Cal. 150.

19. This is an action in the nature of a bill in equity to set aside a judgment recovered by Pacheco against Hunsaker, who, as sheriff, seized and sold certain personal property of Pacheco, under an execution in favor of Dutil against Andeque. Dutil claims the right to maintain this action, on the ground that he indemnified the sheriff against damages for taking said property. It appears by the pleadings, that when the action by Pacheco against Hunsaker was commenced, the latter gave Dutil notice of the action, and that Dutil took charge of the defense, and by his own attorneys defended the action from the commencement to the conclusion. Under such circumstances, the judgment against the sheriff was conclusive evidence of his right to recover against Dutil on the bond of indemnity, by the provisions of section six hundred and forty-five of the Civil Practice Act. By virtue of section six hundred and fifty-nine Dutil might have intervened and defended as a party to the record, as he did as a party in interest, in the name of the defendant on the record. *Dutil v. Pacheco*, 21 Cal. 441.

§ 660. *Intervention may be before or after issue joined.*

A third person may intervene, either before or after issue has been joined in the cause.

¹Amended sec. 72, p. 102.

§ 661. *Intervention, pleadings and proceedings upon.*

The intervention shall be by petition or complaint, filed in the Court in which the action is pending, and it must set forth the grounds on which the intervention rests. A copy of the petition or complaint shall be served upon the party or parties to the action against whom anything is demanded, who shall answer it as if it were an original complaint in the action.

¹Amended 1854, § 73, p. 102.

1. Where a subsequent attaching creditor intervenes in an action for the purpose of setting aside an attachment issued therein, on the ground that there is no debt due from the defendant to the plaintiff, the allegations in the pleading on the part of the intervenor, traversing the complaint, have the same effect as denials in an answer, and require affirmative proof by the plaintiff of his cause of action, in default of which the intervenor will have judgment in his favor. *Speyer v. Ihmels*, 21 Cal. 280.

§ 662. *Intervention, determination upon.*

The Court shall determine upon the intervention at the

same time that the action is decided; if the claim of the party intervening is not sustained, he shall pay all costs incurred by the intervention.

¹Amended 1854, § 74, p. 102.

1. Where the merits of the case were not investigated in the lower Courts by reason of an uncertainty as to the proper mode of proceeding under the anomalous provisions of the Practice Act relating to interventions, the Supreme Court awarded a new trial, although the decision of the Court below upon the main question involved was approved, and the only error disclosed might have been cured by a direction to modify the judgment. *Spencer v. Ihmels*, 21 Cal. 281.

§ 663. *Testimony to be taken by the Clerk on request.*

On the trial of any action in a Court of Record, either party may require the Clerk to take down the testimony in writing.

¹Amended 1854, § 75, p. 102.

1. **Exceptions to be written down by the clerk.**—Where the parties have not made a case nor a bill of exceptions, but have relied upon the testimony taken down by the clerk, pursuant to section two hundred and seventy-one of the Practice Act of 1850, no question can be raised, on appeal, respecting the decisions of the Court below during the progress of the trial. The case of *Gunter v. Geary*, (1 Cal. 462), affirmed in this respect. *Pierce v. Mithurn*, 1 Cal. 470.

2. If a party desires to bring the rulings of the District Judge, during the progress of the trial, under review, he must either make out a statement of facts, pursuant to section two hundred and seventy-two of the Practice Act of 1850, or a bill of exceptions, pursuant to sections two hundred and eighty-seven and two hundred and eighty-eight. This Court will not examine into the correctness of the decisions of the District Judge, where it has been such left to the clerk of the District Court to ascertain and settle what decisions were. *Gunter v. Geary*, 1 Cal. 462.

3. A mere transcript of the evidence taken down by the clerk is no part of the record, unless made so by bill of exceptions. *Wilson v. Middleton*, 2 Cal. 54. These cases affirmed in *Castro's executors v. Armesti*, 14 Cal. 38.

§ 664. *In case of an adjournment, a party may have the testimony of any witness taken.*

The party obtaining a postponement of a trial in any Court of Record, shall also, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a Judge or Clerk of the Court in which the case is pending, or before such Notary Public as the Court may indicate, which shall accordingly be done, and the testimony so taken may be read on the trial with the same effect, and subject to the same objections, as if the witnesses were produced.

¹Amended 1854; § 76, p. 102.

§ 665. *Executions for costs may issue on filing remittitur, or when costs are allowed by order of Court.*

Whenever costs are awarded to a party by an Appellate Court, such party may have an execution for the same, on filing a remittitur with the Clerk of the Court below, and it shall be the duty of such Clerk, whenever the remittitur is filed, to issue the execution upon application therefor; and whenever costs are awarded to a party by an order of any Court, such party may have an execution therefor in like manner as upon a judgment.

¹ Amended 1854, § 77, p. 103.

1. When a remittitur is sent down, the Clerk of the District Court may issue execution for costs. *Mayor of Marysville v. Buchanan*, 3 Cal. 212; affirmed in 20 Cal. 51.

2. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. The clerk below can issue execution for the damages and costs. *McMillan v. Vischer*, 14 Cal. 241.

3. The Clerk of the Court below can issue an execution, if required by the prevailing party, for the costs included in the memorandum, and the costs of the Clerk of the Supreme Court as certified by him on the remittitur. *Ex parte Burrill et al.*, 24 Cal. 350.

§ 666. *Repealing certain laws and revising others.*

Sections five, six, seven, fifteen, sixteen, seventeen, eighteen, nineteen and twenty, of the Act entitled: "An Act Amendatory of and Supplementary to the Act entitled 'An Act to Regulate Proceedings in Civil Cases in the Courts of Justice in this State,'" passed May eighteenth, one thousand eight hundred and fifty-three, are hereby repealed, and the sections amended by said Amendatory Act shall stand revived as amended by this Act.

¹ Amended 1854, § 78, p. 103.

§ 667. *When supplementary Act to take effect.*

This Act shall take effect on the first day of July, one thousand eight hundred and fifty-four.

¹ Amended 1854, § 79, p. 103.



APPENDIX.

AN ACT

CONCERNING FORCIBLE ENTRIES AND UNLAWFUL DETAINEES.

[Approved April 2d, 1866.]

- SECTION 1. Forcible entry.
2. Forcible detainer.
3. Forcible entry in night time, or during the absence of the occupant.
4. Jurisdiction.
5. Complaint; Judge to fix day for appearance of defendant; summons, etc.
6. Summons, what it shall contain.
7. Answer; demurrer; jury trial; pleadings to be in writing; and proceedings, etc.
8. Arrest and bail.
9. Showing required of plaintiff; of defendant.
10. Complaint may be amended; continuance, etc.
11. Necessary parties defendant.
12. Restitution and damages.
13. Proceedings same as in civil cases; appeal shall not stay writ of restitution.
14. Court Commissioner.
15. What Acts repealed.

§ 1. *Forcible entry.**

* Sections one and two of this act concerning forcible entry and unlawful detainers, passed April 23, 1866, remained without amendment until the Act of April 27, 1868 [Statutes 1868, 493] which latter act, so far as it relates to forcible entries and detainers, was superseded by the Act of 1868, now in force. For more convenient reference, in connection with the decisions of the Supreme Court, and contrast with the law of 1862, and with the phraseology of the present law defining what shall constitute a forcible entry and detainer, said sections are given below:

§ 1. No person or persons shall hereafter make any entry into lands, tenements, or other possessions, but in cases where entry is given by law, and in such cases, not with strong hand nor with multitude of people, but only in a peaceable manner; and if any person from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by fine.

§ 2. Any Justice of the Peace shall have authority to inquire, as hereinafter directed, as well against those who make unlawful or forcible entry into lands, tenements, or other possessions, and detain the same, as against those who, having lawful and peaceful entry into lands, tenements or other possessions, unlawfully detain the same; and if it be found, upon such inquiry, that an unlawful or forcible entry hath been made, and that said lands, tenements, or other possessions, after a lawful entry, are held unlawfully, then such Justice shall cause the party complaining to have restitution thereof.

See now, the first two sections of the Landlord and Tenant Act, which were in force from the 1st day of January, 1866, until the date of this act—which went into operation June 1, 1868. They are now questionably repealed.

If any person shall, with violence and a strong hand, enter upon or into any lands or buildings, either by breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, or if any person, after entering peaceably, shall turn out by force, or by threats, or by menacing conduct, the party in possession, such person shall be deemed guilty of a forcible entry, and may be proceeded against and punished as hereinafter provided.

[The decisions which are to be found in the thirty-second volume of the California Reports have been rendered in actions brought under the existing law. Those in the preceding volumes relate to the law of April 22, 1850, and to amendatory and supplementary acts, and, generally, will be found to be authority in the administration of the act now in force, as neither the statutory nor the common law definitions of what constitutes a forcible entry or forcible detainer have been changed by the present act, but new conditions have been added by which this remedy has been extended to cases where, possibly, it did not previously lie.]

1. **Construction of the statute.**—The statute of forcible entries and detainers provides a remedy for an unlawful entry, as well as a forcible entry, and the policy of it is doubtless to avoid nice distinctions as to what constitutes force in an entry upon lands. *Moore et al. v. Goshin*, 5 Cal. 266.

2. It must be strictly construed. *House v. Keiser*, 8 Cal. 499.

3. The true construction of this act, as to the mode of proceeding, would seem to be this: the case must be governed by the provisions of the act, so far as they go, and as to other matters not embraced in the words of the act, the general rules governing proceedings in these Courts will apply. *People v. Harris*, 9 Cal. 872.

4. The proceedings provided for in the act of 1850, concerning "forcible entry and unlawful detainer," are not a substitute for the action of ejectment. The object of the act excluding the thirteenth section is to redress wrongs occasioned by force used or threatened by the defendant, by restoring possession to the plaintiff, and punishing the defendant with fine and treble damages. *Owen v. Doty*, 27 Cal. 502.

5. The action of forcible detainer is not intended as a substitute for the action of ejectment. *Hodgkins v. Jordan*, 29 Cal. 577.

6. The general terms "actions of forcible entry and detainer," as employed in the Constitution of the State, include actions for the unlawful holding over by tenants. *Brumagim v. Spencer*, 29 Cal. 661.

7. **What cannot be tried in the action.**—*FRID, J.*—The validity of the lease under which the lessee held the premises cannot be tried in this action, nor can the lessee be deprived of the advantages resulting from the possession of the premises under the lease, by a forcible ouster under legislative enactment. *McCauley v. Waller*, 12 Cal. 800.

8. **The defendant's title, or right to the possession,** cannot be tried in this action. *Mitchell v. Davis*, 28 Cal. 381; *Davis v. Mitchell*, Oct. T. 1865.

9. **When an action can be maintained.**—S. was in possession of a quartz mill under a lease; the mill had been run until one or two o'clock in the morning, when the employes of the plaintiff closed up and retired to rest in the mill. Before day light, and while the hands were actually sleeping in the mill, and the products of the last day's work were still in the amalgamating tubs, the defendants—some five or six in number—entered the mill, took possession, commenced tearing down the stamps under pretense of making repairs, and retained possession against repeated demands and protest of the plaintiff and his employes: *Held*, that these facts constituted sufficient evidence of force to maintain the action of forcible entry. *Scarlett v. Lamargue*, 5 Cal. 63. Commented on in *Property v. Kelly*, 24 Cal. 319.

10. Force, either actually applied or justly to be feared from the conduct of the defendant, is essential to the support of this action. *Fraser v. Hanlon*, 5 Cal. 154.

11. To sustain an action of forcible entry, or forcible and unlawful detainer, actual force, threats of violence in the entry, or the just apprehension of violence to the person, must be shown to have existed, unless the detainer be riotous. *Id.*

12. The action of forcible entry and detainer may be maintained in three cases: first, when the entry is forcible; second, when the entry is simply unlawful, and the detainer forcible; third, when the entry is lawful, and the holding over forcible. But in all cases, there must be something of personal violence, either threatened or actual. *Dickinson et al. v. Maguire et al.*, 9 Cal. 46.

13. The action of forcible entry and detainer is a summary proceeding to recover possession of premises forcibly or unlawfully detained. The inquiry in such cases is confined to the actual peaceable possession of the plaintiff, and the unlawful or forcible ouster or detention by defendant—the object of the law being to prevent the disturbance of the public peace, by the forcible assertion of a private right. Question of title or right of possession cannot arise; a forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee simple, title and present right of possession is

shown to be in the defendant. *McCauley v. Weller*, 12 Cal. 500; *Davis v. Mitchell*, Jan T. 1865.

14. Where parties threaten to take forcible possession of property, and the complaint does not aver the insolvency of the defendants, and that there is no adequate remedy at law, an injunction will not be granted; where forcible possession is taken, forcible entry and detainer would be a speedy mode of regaining possession, and for other damages, the usual proceedings at law would suffice. *Tomlinson v. Rubio*, 16 Cal. 201.

15. Where in ejectment by B. & K., a writ of restitution was issued on judgment in favor of B., and under it K. was removed from the land by the proper officer, and W. put in possession, as agent of B., and then, about a month afterwards, W. leased the premises to H.: Held, that K. cannot maintain forcible entry and detainer against H., the lessee, on the ground that the act of the officer in removing and putting W. in possession was *tortious*, because not justified by the writ. *Kennedy v. Hamer*, 19 Cal. 375; *Janson v. Brooks*, 29 Cal. 214.

16. One who, with armed men, enters upon land inclosed with a fence, and in the possession of another, and commences the erection of a house, and refuses to deliver up peaceable possession on demand, but makes a show of force to retain it, is guilty of forcible entry and detainer. *Watson v. Whitney*, 28 Cal. 375.

17. Several persons were owners of separate tracts of land within an outside fence which formed a common inclosure; but the division lines of the separate tracts within the common inclosure were well known and defined, and each person cultivated his own tract. A. and B., two of these owners, disposed of their tract to C. Soon after this D., who was the owner of another tract within the inclosure, went upon the tract sold to C. and commenced plowing; C. went to D., took hold of his horses, and commenced turning them from the tract, when D. drew a pistol and aiming it at him, threatened to hurt him if he did not leave; D. continued plowing the land: Held, that the acts committed by D. clearly amounted to a forcible entry and detainer, and that the general outside fence constituted as full and complete an actual possession in the owner of each separate tract as though it had been inclosed by a lawful fence. *Hussey v. McDermott*, 23 Cal. 413.

18. One who goes to a lot in another's possession, accompanied by several men, and builds a fence around it while the former possessor is remonstrating, and removes him from the line of the fence, where he places himself to prevent the fence from being built, is guilty of a forcible entry. *Valencia v. Couch*, 32 Cal. 340.

19. One entering upon a lot in the possession of another does not effect a complete entry and acquire possession until he has expelled the party in possession and effected an exclusive lodgment. *Id.*

20. A person has possession of a lot twenty-eight feet by one hundred and thirty-two, sufficient to enable him to maintain forcible entry and detainer, if it adjoins a lot upon which he lives, and has a stable on it, and he cultivates it, even though the fence inclosing the whole is not very substantial. *Id.*

21. When an action cannot be maintained.—Facts which might constitute a mere trespass upon property have never been held to sustain the action of forcible and unlawful detainer. *Fraser et al v. Hanlon*, 5 Cal. 156. *Merrill v. Forbes*, 23 Cal. 379.

22. One who enters upon land for the purpose of cutting and taking away grass or crops growing thereon, without any intention of taking possession of the land, and without residing thereon, is not guilty of a forcible entry and detainer. *Merrill v. Forbes*, 23 Cal. 379.

23. If the entry of the defendant was lawful, the plaintiff cannot when his right to the possession has expired, expel him therefrom, or by using or threatening force make his entry unlawful. *Id.* *Owen v. Doty*, 27 Cal. 502.

24. When one person has a house upon a portion of a tract of land of one hundred acres which he is occupying, and another person enters upon another part of the tract and erects a house, without doing anything further, this act does not constitute a forcible entry upon and detainer of the whole tract. *Thompson v. Smith*, 28 Cal. 527.

25. A sheriff is not guilty of a forcible entry, if acting in good faith, by virtue of a writ of restitution, he removes from the premises a person against whom the writ does not run, and who is not in privity with any one against whom the writ does run. *Janson v. Brooks*, 29 Cal. 214.

26. Possession necessary to maintain forcible entry and detainer.—To sustain forcible entry and detainer, plaintiff must have been in actual possession; and when the land is public land, not taken up under our Possessory Act, nor under the Federal laws, such actual possession can be shown only by actual inclosure, or its equivalent. Merely putting down stakes, or marking out a boundary line, is not sufficient. *Preston v. Kehoe*, 15 Cal. 315.

27. Where plaintiff had been in the peaceable and quiet possession and use of the premises through his agent and by his tenants, and the building being unrented, had locked the door and taken the key to his office, he was in the "actual possession" of the premises, within the statute of forcible entry and detainer. *Minturn v. Burr*, 16 Cal. 107.

28. The statute does not require actual occupancy, and "actual possession" consists as much of a present power and right of dominion as of an actual corporeal presence in the house. *Id.*

29. In actions of forcible entry and detainer, the fact of possession, and not the right of possession, is what is to be determined. *James Mitchell v. Davis*, 20 Cal. 45.

30. One who in the morning enters upon a portion of a tract of land in the possession of another, and incloses it with a fence, and puts a house on it before sundown, does not acquire such a peaceable possession as to enable him to maintain forcible entry and detainer against the possessor, who at sundown of the same day destroys the house and fence, and drives him away. *Hoag v. Pierce*, 28 Cal. 187.

31. The plaintiff, in forcible entry and detainer, must show an actual, peaceable and

exclusive possession, in him a scrambling or interrupted possession is not sufficient. *Id. House v. Keiser*, 8 Cal. 499.

32. The plaintiff must have had the actual possession when the wrongful or forcible entry was made; and if a forcible detainer alone is complained of, the entry of the defendant must have been unlawful. *Owen v. Doty*, 27 Cal. 502.

33. Right to protect one's possession. — One who is in the possession of a tract of land has the right to resist and expel an intruder, if the resistance and expulsion take place before the possession of the intruder had become actual and peaceable. *Hoag v. Pierce*, 18 Cal. 187.

34. The law will not permit a party to take forcible possession, even of his own lands, if they are in the peaceable though wrongful possession of another; and if he does so he will not only be compelled to restore the possession before his title will be investigated, but will also be punished by fine and a further judgment for treble damages for his own infringement of the laws. *Davis v. Mitchell*, Jan. T. 1865.

35. Verdict. — In an action for a forcible and unlawful entry and detainer of a mine, against a corporation and C. and V., the jury returned a verdict of guilty as to C. and V., and not guilty as to the corporation: *Held*, that such verdict is conclusive that the plaintiff was peaceably in actual possession of the premises at the time of the entry; that unlawful and forcible entry on his possession was made by the defendants C. and V.; and that the corporation did not participate in the trespass. *Frement v. Crippen*, 10 Cal. 211.

36. The peaceable and actual possession of the plaintiff is incompatible with the forcible possession of another, and such a verdict is conclusive against the possession of the corporation. *Id.*

37. When a writ of restitution has been awarded in such a case, and the sheriff refuses to execute the same, on the ground that the mine is in the possession of certain persons not parties to the suit, who claim to hold under the corporation, the Court will award a peremptory writ against the sheriff and compel him to execute the writ. *Id.*

§ 2. Forcible detainer.

If any person shall, by force and with a strong hand, or by menaces and threats of violence, unlawfully hold and keep the possession of any lands or tenements, whether the same were acquired peaceably or otherwise, such person shall be deemed guilty of a forcible detainer, and may be proceeded against as herein provided.

1. The declaration of the defendant to the plaintiff that he will not go off the premises, unless put off by force or by law, does not constitute a forcible detainer. *Hodgkins v. Jordan*, 29 Cal. 877.

2. The mere surmise of a person, that if he attempts to regain possession, force will be used to prevent it, is not enough to show a forcible detainer, but an attempt must be made to regain possession, and either force or threats of force, used to resist it. *Id.*

3. P. had possession of a lot of land, by having it inclosed with a fence, but did not reside on it, nor have a house on it. M. and D. entered into possession, and built a house on the premises, and moved into it. Five days afterwards, an agent of P. went to the premises and told M. and D. that he had come there to take possession for P. They replied that it would be very foolish to give up the lots after making improvements on them; that they would not leave, and that it would take a pretty good force to put them off; that they had paid their money for the lots, and they would be damned if they would leave. To another agent of P., M. and D. used substantially the same language: *Held*, that this did not amount to a forcible entry or unlawful detainer, and that the evidence was insufficient to authorize P. to maintain action, and that the Court should have granted a nonsuit: *Held*, further, that such acts amounted merely to a trespass and ouster of P., for which ejectment was the proper remedy. *Polsack v. McGrath*, 25 Cal. 56.

4. A naked avowal of an intention to keep possession, and actually keeping possession, do not necessarily constitute such force, or threat of force, as to render a detainer forcible, where there has been an unlawful entry, unless such avowal is made in answer to a demand for possession by the party claiming to have been ousted, and is accompanied by some act or word of the party making the unlawful entry, showing an intent on his part to maintain the possession by force. *Fegarty v. Kelly et al.*; 24 Cal. 317. See ante § 1, No. 17.

§ 3. Forcible entry in the night time, or during the absence of the occupant.

If any person shall, in the night-time, or during the absence of the occupant of any lands or tenements, unlawfully enter upon such lands or tenements, and shall, after demand made for the surrender of such premises for the period of five days refuse to surrender the same to such former occupant, such person shall be deemed guilty of a forcible detainer, and may be proceeded against as herein provided for such offense; provided, that the party shall be deemed the actual occupant of lands who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands or tenements.

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§ 4. Jurisdiction.

Actions for the recovery of the possession of any lands or tenements under the provisions of this act, and for damages consequent upon any forcible entry or forcible detainer, shall be commenced and prosecuted in the County Court of the county in which such lands or tenements or some portion thereof may be situate, and as herein provided.

1. The new County Courts, as organized under the amended Constitution, January 1, 1866, had authority to proceed, try, and determine appeals in cases of forcible entry and detainer, pending in the old County Courts on the last day of 1863. *McMinn v. Bliss*, 81 Cal. 122.

§ 5. Complaint. Judge to fix day for appearance of defendant, and summons.

The plaintiff shall present to the County Judge his written complaint, setting forth therein the facts on which he seeks to recover, and shall describe the premises sought to be recovered with reasonable certainty, and may charge that the defendant has acted fraudulently in making such forcible entry or holding such possession by force, (in case where the action is brought for a forcible entry or forcible holding;) and may claim such damages therefor as he may deem proper; but in such case he shall state the facts constituting the fraud. Upon receiving such complaint the Judge shall fix a day for the appearance of the defendant in such action, and shall indorse the date thus fixed, together with the day of the presentation of said complaint, upon said complaint; the Judge shall further provide and direct upon said complaint that the summons to be issued thereupon shall be served upon the defendant at a day not less than three days previous to the day set for the appearance of said defendant, and not more than twenty days from the date of making the order, fixing the return day of the summons.

1. **Complaint, parties plaintiff.**—A tenant in common cannot maintain an action of forcible entry and detainer against his co-tenant for holding over. The land must first be partitioned. *Lick v. O'Donnell*, 3 Cal. 69.

2. The remedy is a summary one, given by statute to protect the possession, and cannot be extended by implication to any other than the real occupants. *Treat v. Stuart*, 5 Cal. 113.

3. A landlord cannot sue in this form, in his own name, for an unlawful entry upon the possession of his tenant. *Id.*

4. This action can only be maintained by the person ousted; his grantee cannot maintain the action. *House v. Keiser*, 3 Cal. 499.

5. Where one man acts openly and avowedly for another in leasing or controlling his property, this is sufficient as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession of the agent is the possession of the principal, who can maintain forcible and unlawful entry and detainer against such third persons, whether the agent had any written authority or not. *Minturn v. Burr*, 16 Cal. 107.

6. In an action of forcible entry, the persons by whose direction, agency and procurement the forcible entry is made, are liable in the action. *Minturn v. Burr*, 20 Cal. 48.

7. The action may be brought by the husband and wife, if the wife is a sole trader. *Howard v. Valentine*, 20 Cal. 282.

8. In an action between S. and D., a writ of restitution issued commanding the sheriff to cause D. to be removed from certain premises, and S. to have restitution of the same. The return to the writ by the sheriff shows that he "put S., by his representative M., in peaceable possession." *Held*, that the possession under the writ was that of S., and not of M.; that M. was the mere agent of S., and that the presumption of the continuance of that relation was not destroyed by proofs of acts of control over the premises subsequently exercised by M. which were not inconsistent with his position as agent. *Mitchell v. Davis*, 20 Cal. 45.

9. After the service of the writ, and while the relation remained unchanged between S. and M., D. entered upon the premises, and an action under the forcible entry and unlawful detainer statute was thereupon commenced by and in the name of M. against D. *Held*, that M. could not maintain the action by reason of his want of possession. *Id.*

10. **Venue.**—If the complaint in forcible entry and detainer avers that the lands are in the county where the suit is brought, a failure to mention the State will not be a fatal defect. *Mere v. Del Valle*, 28 Cal. 170.

11. **Possession, averment of—complaint.**—The objection to a complaint in forcible entry and detainer, that it does not aver "actual possession"—the word

"possession" only being used—was a mere defect in pleading, which should have been taken advantage of below, where, if the objection be good, the complaint could have been amended; but it cannot be urged in the Supreme Court for the first time. *Mistura v. Barr*, 16 Cal. 107.

12. It is an essential averment in the complaint, in an action of forcible entry and unlawful detainer, that at the time of the alleged forcible entry, plaintiff was in the actual possession of the premises; and in order to maintain the action, plaintiff must prove this averment on the trial. *Cummings v. Scott*, 28 Cal. 526.

13. If the complaint in forcible entry and detainer sufficiently shows an actual peaceable possession in plaintiff, it will be sufficient without the use of the word "actual;" but it is better to use the statutory term. *More v. Del Valle*, 28 Cal. 170.

14. An averment of title in forcible entry and detainer may be treated as surplusage. *M.*

15. Forcible entry or forcible detainer—averment of.—A complaint in an action under the forcible entry and detainer act, other than actions against tenants holding over as provided in said act, does not state facts sufficient to constitute a cause of action, unless it allege a forcible entry or a forcible detainer. *McEwoy v. Igo*, 27 Cal. 375.

16. If the complaint charges a forcible entry with a multitude of people, and a forcible and unlawful detainer, the forcible entry is the gist of the action. *McMinn v. Biss*, 21 Cal. 122.

17. Causes of action must be separately stated.—Forcible entry and forcible detainer are separate causes of action, and ought to be separately stated in different counts in the complaint. If not so stated the complaint is bad on demurrer, but if the complaint is not demurred to, the objection is waived. Fraud, if relied on, should also be separately stated. *Valencia v. Couch*, 32 Cal. 341.

18. Description of the land.—In forcible entry and detainer, a description of the land, sufficiently definite to enable the administration of substantial justice, is all that is required in actions before Justices of the Peace. *Hernandez v. Simon*, 4 Cal. 182.

19. In an action of forcible entry and detainer, the complaint described the premises as "about ten rods square, situated within and comprising the northwesterly corner of that certain piece or parcel of land, bounded and described as follows, to wit:—" (the complaint then goes on to give the metes and bounds of a tract containing one hundred and forty-six acres.) "The said ten rods square being situated from twenty to fifty feet, more or less, southeasterly from the house of defendant, and near the gate aforesaid, and the junction of the San Bruno turnpike road with the road leading from the city of San Francisco to Hunter's Point." Said gate was where this last road passed through. The proof, among other things, showed this ten rods to be called the northeasterly instead of the northwesterly corner of the tract. The judgment for plaintiff followed the description in the complaint. Defendant appeals: *Held*, that the variance in the description of the premises did not prejudice appellant; that the question was one of identity, and the fact that the corner of the small tract was called the northeasterly instead of the northwesterly corner, was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises. *Paul v. Silver*, 16 Cal. 73.

20. The description of the land was as follows: "That tract or parcel of land situated in the county of Santa Barbara and known as the Rancho Lease, granted by the Mexican nation to Don Carlos Antonio Carrillo, by grant dated November 29th, 1833, and bounded and described as follows: bounded by the Mission San Fernando and San Buenaventura, situated in the then jurisdiction of Santa Barbara, containing six square leagues—a little more or less." *Held*, that upon the face of the pleadings the description was sufficient. *More v. Del Valle*, 28 Cal. 170.

21. Allegations of complaint, how construed.—The allegations of a complaint must be construed most strongly against the pleader. A complaint that alleges that he is in possession in one place, and in another avers that he is not, shows no cause of action. *Dickinson v. Maguire*, 9 Cal. 48.

§ 6. Summons, what it shall contain.

The complaint thus indorsed shall be then filed with the Clerk of the County Court, and the Clerk shall forthwith issue a summons under the seal of said Court. Such summons shall state the parties to the action, the Court in which the same is brought, the nature of the action in concise terms, and the relief sought, and also the day fixed for the appearance of the defendant therein, and the number of days before the time of the appearance that the same is to be served on the defendant. It shall command said defendant to appear and answer within the time designated in said summons, or that the relief sought will be taken against him. The summons shall be directed to the defendant, and shall be served by the sheriff of the county, or other person duly qualified, by delivering to such defendant a certified copy thereof, and the return of the sheriff shall show the day and place at which the same was served.

§ 7. *Answer; demurrer; jury trial; pleadings to be in writing; proceedings, etc.*

On or before the day set for his appearance therein, the defendant shall file with the Clerk, and in said cause, his written answer, demurrer, or demurrer and answer, or other appearance, or, if he fail to so appear, the Clerk shall note his default, and the Judge shall thereupon, upon satisfactory evidence, order such judgment as shall be just in the premises. Whenever an issue of fact is presented by the pleadings, the County Judge, upon the application of either party, shall order the Clerk to issue a venire for a special trial jury to be summoned for the day fixed by the Court for the trial of said cause. Such jury shall be summoned in the same manner as provided in section twenty-eight of an act entitled an act concerning grand and trial juries, approved April twenty-seventh, eighteen hundred and sixty-three, and shall possess the qualifications prescribed by the said act, and shall be subject to the same challenges. All pleadings under the provisions of this act shall be in writing, and verified by the parties in the same mode prescribed by law for the verification of pleadings in other civil cases. All proceedings for the trial and determination of causes arising under this act, not herein provided for, shall be regulated by the provisions of the Civil Practice Act of this State so far as the same may be applicable thereto.

1. *Specific denials required.*—The party must specifically deny each allegation he desires to controvert, and when the allegation is complex, embracing several clauses or propositions, he must deny each branch of the proposition separately and disjunctively, or his denial will be insufficient. *Moore v. Del Valle*, 28 Cal. 172; *Barks v. Carruthers*, 31 Cal. 468.

2. If the answer in forcible entry and detainer, under the act of 1863, does not deny the material allegations of the complaint, and no material new matter is set up, no issue is raised, and plaintiff is entitled to judgment on the pleadings. *Moore v. Del Valle*, 28 Cal. 370.

3. The provisions of the Civil Practice Act, with regard to the denials of the allegations of the complaint by the answer, apply to the actions of forcible entry and detainer instituted under the act of 1863, and to said actions upon all other points not otherwise provided for in said act. *Id.*

§ 8. *Arrest and Bail.*

If the complaint in the action presented shall establish, to the satisfaction of the County Judge, fraud, force, or violence in making such entry, or in holding such possession, and that such possession is unlawful, the Judge may also make an order for the arrest of the defendant, and all the provisions of law, from section seventy-six to section ninety-eight, both included, in title five, chapter one, of an act to regulate proceedings in civil cases in the Courts of justice of this State, passed April twenty-ninth, eighteen hundred and fifty-one, shall be and are hereby made the rule of proceeding to said arrest and bail in said action of forcible entry or forcible detainer.

§ 9. *Showing required of plaintiff; of defendant.*

On the trial of any such action of forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that, he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of said action, and that his interest therein is not then ended or determined, and such showing shall be a bar to the action in all cases provided for in this act.

1. **Plaintiff's showing—evidence.**—In an action of forcible entry and detainer, the holding over the land is the foundation of the action, and must necessarily be proved, like any other substantive fact. *Reed v. Grant*, 4 Cal. 176.
2. The plaintiff in this action must show an actual peaceable possession in himself at the time of the entry. *Treat v. Stuart*, 5 Cal. 113.
3. Proof of actual force is not necessary to maintain this action; but threats, etc., showing an intention to resort to violence if resistance is offered, are sufficient. *O'Callaghan v. Booth*, 6 Cal. 63.
4. What is actual, and what constructive possession, in many cases, must be a question of fact for the jury. *Id.*
5. When the plaintiff in an action for a forcible entry, for the front of a town lot, proved that he had a small house on the rear of it: *Held*, sufficient to warrant a jury in finding an actual possession of the whole lot. *Id.*
6. Where a plaintiff had obtained judgment in another Court for a quarter's rent under a lease: *Held*, that in an action of forcible entry for nonpayment of another quarter's rent under the same lease between the same parties, the plaintiff could introduce the former judgment as evidence on all the points identical in the two cases. *Love v. Wallis*, 7 Cal. 260.
7. Where the complaint avers forcible and unlawful entry, and that defendants forcibly detained the premises so unlawfully taken, forcible entry must be proven—the averment of detainer not being stated as an independent ground of relief. *Preston v. Kehoe*, 16 Cal. 314.
8. In such action, proof of forcible detainer does not prove forcible entry. *Id.*
9. Where a building locked up, and so in possession of plaintiff, has been entered by third persons, and taken possession of forcibly and unlawfully, and is detained, it should be left to the jury to determine how and by whose direction, agency or procurement the entry was made, and whether by preconcert and arrangement or not; and if they find possession was taken by the act, agency and co-operation of all the defendants, and the holding, whether by one or many, was in pursuance of such arrangement or preconcert, then the defendants are guilty of the entry and detainer. *Minturn v. Burr*, 16 Cal. 107.
10. In an action of forcible entry and detainer, in order for the plaintiff to recover possession of land held by prescription, it is indispensable to prove that the premises upon which the defendant entered were within the lines described in the plaintiff's affidavit. *Edwards Cummins v. Edward Scott*, 20 Cal. 63.
11. On the trial of an action of forcible entry and detainer, the plaintiff offered in evidence a judgment against defendant awarding possession of the land; and the writ of restitution issuing on the same; and the sheriff's return thereon: *Held*, to be competent evidence, for the purpose only of showing the extent of plaintiff's possession, and that defendant was estopped from contesting the same. *Mitchell v. Davis*, 23 Cal. 381.
12. If the plaintiff relies on an unlawful entry and a subsequent forcible detainer, a deed of conveyance of the property to the defendant or his lessor is admissible in evidence in his behalf, to show the good faith of his entry; but if the plaintiff relies on a forcible entry and detainer, such deed is not admissible. *Thompson v. Smith*, 28 Cal. 527.
13. **Forcible entry and detainer.**—If the plaintiff seeks to recover on the ground of a forcible entry and detainer, and the proofs show that there was no actual force, and that he neither apprehended, nor had any ground to apprehend any positive act of violence from the defendant, he cannot recover. *Id.*
14. The evidence must tend to prove an entry by the defendants with strong hand, with unusual weapons, or with menace of life or limb, or they cannot be convicted of a forcible entry. *McKinn v. Bliss*, 31 Cal. 122.
15. **There must be evidence tending to prove an actual exhibition of force to retain possession, and of present ability and disposition to use it, to warrant a conviction of a forcible detainer.** *Id.*
16. For the purpose of determining whether an entry is forcible, all that transpires between the parties from the time of the coming of one until the going out of the other is to be taken into account. *Valencia v. Conch*, 32 Cal. 340.
17. **Defendant's showing—evidence.**—In an action of forcible entry and detainer, all matters of legal excuse, justification, or avoidance, can be given in evidence by the defendant, under a general denial of the allegations of the complaint. *Watson v. Whitely*, 23 Cal. 375. [But see *More v. Del Valle*, 28 Cal. 173.]
18. If the party guilty of a forcible entry has any title or right of possession, his title or right of possession cannot be tried in an action of forcible entry and detainer. He must first deliver up the possession forcibly acquired, and then he may litigate his title or right to possession in a proper action. *Mitchell v. Davis*, 23 Cal. 381.
19. If D. and H. are in the peaceable possession of a lot of land, and S. and B., accompanied by others—their employees—forcibly evict them therefrom and take possession, and then lease the lot to B., who enters into peaceable possession, and five days afterwards D. and H., with others, forcibly dispossess B. and take possession, and B. brings an action of forcible entry against them, D. and H. cannot introduce evidence of their prior eviction by S. and B. in defense. *Ross v. Duane*, 27 Cal. 568.
20. **Instructions to jury.**—F. brought an action against K. for an unlawful entry and forcible detainer. F. did not reside on the premises, and his only possession consisted in an inclosure and cultivation. K. went within the inclosure in the night time, erected a cabin, and, at some subsequent period of time, declared he would keep possession by force. The Court instructed the jury that if they found "that the defendant entered upon the premises in the night time, during the hours of sleep, while the plaintiff was in the actual and peaceable possession of the same, and that he took possession and avowed the intention to keep possession, and actually did keep possession, it was sufficient evidence of fact to maintain the action of forcible entry and detainer, and the jury should find for the

plaintiff." *Held*, that the instruction was erroneous, as applied to the testimony of this case, because that portion of it relating to K.'s intention to keep possession made no reference to any demand on the part of F. for possession, and because the instruction was framed as though it related to a question of forcible entry, and not forcible detainer. *Pogarty v. Kelly et al.*, 24 Cal. 317.

§ 10. *Complaint may be amended; continuance, etc.*

Whenever, upon the trial of any cause under the provisions of this act, it shall appear from the evidence that the defendant has been guilty of either of the offenses herein provided for a forcible entry or a forcible detainer, and other than the offense charged in the complaint, the Judge shall order that such complaint be forthwith amended to conform to such proofs. Such amendment shall be without any imposition of terms, nor shall any continuance be permitted upon account of such amendment, unless the defendant, by affidavit filed, shall show to the satisfaction of the Court, good cause therefor.

1. If the plaintiff sues upon one only, or upon two of the causes of action mentioned in the forcible entry and detainer act, and the testimony makes a cause of action named in the act, but not set out in the complaint, it is the duty of the Court, on its own motion or on the motion of the plaintiff, to permit him to amend his complaint to suit the testimony. *Valencia v. Couch*, 33 Cal. 340. *Id.*

§ 11. *Necessary parties defendant.*

No person other than the actual occupants of the premises shall be necessary parties defendant to proceedings specified in this act; nor shall any action abate or plaintiff be nonsuited for the misjoinder of any persons who might or should have been made parties defendant; but when it shall appear that any of the parties served with process or appearing in said action are guilty of the offense charged, judgment shall be rendered against such persons thus found guilty. And in case a married woman be a tenant or occupant, and her husband is not a resident of the county in which the premises are situated, her marriage shall not be a defense in such proceedings; but in case her husband be not joined, or unless she be doing business as a sole trader, a judgment against her shall be only valid against property on the premises at the time of the commencement of the action.

1. *Parties defendant.*—An action of forcible entry and detainer will not lie against a party claiming a right to land, who is not in the actual possession. *Preston v. Kehoe*, 10 Cal. 445.

2. A person may be guilty of a forcible entry who is not actually present, and does not actively assist therein. He is guilty of an entry made with force by one acting at the time under his direction and procurement. *Minturn v. Burr*, 20 Cal. 48.

3. An action under the act concerning forcible entries and unlawful detainers will not lie against a party who has been put in possession by a sheriff in good faith, by virtue of a writ of restitution, even if the person turned out, and who brings the action, was one whom the officer could not lawfully dispossess by virtue of the writ. *Janson v. Brooks*, 29 Cal. 214. [See further, sub-head "When an action cannot be maintained."

§ 12. *Restitution and damages.*

If, upon the trial of any action under the provisions of this act, the verdict of the jury or the finding of the Court shall be in the favor of the plaintiff and against the defendant, the Court shall thereupon enter judgment for the plaintiff to have restitution of the premises, and the jury, or the Court in case the action is tried without a jury, shall also find or assess the damages occasioned to the plaintiff by such forcible entry or forcible detainer, and judgment shall be at once entered by the clerk in favor of the plaintiff and against the defendant for three times the amount thus assessed.

1. *Writ of restitution.*—Where a sheriff refuses to execute the writ on the ground that the premises are in possession of persons not parties to the suit, the Court will award a

peremptory *mandamus* against the sheriff to compel him to execute the writ. *Frement v. Crippen*, 16 Cal. 311.

2. Where in forcible entry and detainer, plaintiff had judgment in the Justice's Court, and was placed in possession of the land by a writ of restitution, and subsequently, defendant gave bond and appealed to the County Court, where, after trial, there was a verdict for defendant: *Held*, that the County Court had power, after reversing the judgment of the Justice, to award defendant a writ of restitution; that such a writ was necessary to perfect the jurisdiction of that Court over the subject. *Kennedy v. Hawer*, 19 Cal. 375.

3. *Stark v. Barnes*, (4 Cal. 412) does not hold that a party succeeding to the original wrongful possession is liable in action of forcible entry and detainer in the same manner as his predecessor, because there Barnes came in without any new title, and merely succeeded to the claim, and consummated the trespass of the original trespasser. *Id.*

4. **Damages.**—A., in pursuance of the provisions of the "Act prescribing the mode of maintaining and defending possessory actions on lands belonging to the United States," entered upon unoccupied land, and marked it out, so that its boundaries might be easily traced, and commenced to build a house upon it, when he was ousted by B.: *Held*, that in an action of forcible entry, A. could recover the land from B., but without a fine or treble damages. *Stark v. Barnes*, 4 Cal. 412.

5. The complaint in an action of forcible entry need not pray for treble damages, to warrant the Court in trebling them. *Hart v. Moon*, 6 Cal. 169.

6. The power of the County Court to treble the damages by way of penalty in actions of forcible entry, results by necessary implication from its power to *try de novo*. *O'Callaghan v. Booth*, 6 Cal. 63.

7. In forcible entry and detainer tried in the County Court, on appeal from a Justice's Court, plaintiff, having obtained a verdict for one hundred and fifty dollars damages, moved that they be trebled. Motion denied, and judgment entered for one hundred and fifty dollars, with restitution of the premises. Plaintiff applies to the Supreme Court for *wandamus* to compel the Court below to render judgment for treble damages: *Held*, that the application must be denied, as plaintiff has an adequate remedy by appeal; pending which, plaintiff can enforce so much of the judgment as awards restitution. The judgment can be corrected in this Court, if proper, by trebling the damages. *Early v. Mannis*, 15 Cal. 149.

8. *Query*: Whether, if plaintiff in forcible entry and detainer inserts in his complaint a conditional prayer, that if waste be committed on the property pending the suit, investigation be had in relation thereto, and the damages occasioned thereby be allowed, he is then entitled to prove such damages, and have them assessed by the jury. *Hicks v. Herring*, 11 Cal. 566.

9. Under the twelfth section of our Forcible Entry and Detainer Act, plaintiff is not compelled to claim damages for waste and injury, or for rents and profits. He may simply claim possession; and, in a subsequent suit, may recover damages, for waste committed pending the action of forcible entry and detainer. *Id.*

10. In forcible entry and detainer, it is optional with plaintiff either not to claim any damages, or to claim only such as arise from loss of rents, or from waste, or from both. There is no such connection between the rents and profits and waste committed as to require the damages from the loss of the one and the commission of the other to be united in the demand. *Id.*

11. In actions for damages for waste, the rule is, that the proof of damage may extend up to the time of verdict as to all facts which flow as a natural result from the injury for which suit is brought. *Id.*

12. Section twelve provides that "damages shall be assessed as well for waste and injury committed upon the premises, as for the rents and profits during the detainer," and the verdict shall find the monthly value of the rents and profits. The meaning of this is, that the rents are to be regarded merely as damages, and that their amount during the period of the detention is to be ascertained by estimating their monthly value. *Howard v. Valentine*, 20 Cal. 282.

13. The plaintiff in an action under this section can only recover the rents which accrue after the possession of the tenant becomes unlawful; the rents accruing prior to that time are not recoverable. *Id.*

14. The amount of rents is immaterial, and whether it is one dollar or one thousand dollars, the jurisdiction is the same. *Id.*

15. Rents and profits may be awarded on damages without the value thereof being stated in the complaint. *Holmes v. Horber*, Oct. T. 1892.

16. If a complaint in an action arising under the act concerning forcible entries and unlawful detainers, contains proper averments of damages sustained, and plaintiff recovers, and damages are found, either by the Court or by the verdict of a jury, it is the duty of the Court to treble the damages, although treble damages are not asked for in the complaint. Damages may be assessed both for waste and injury, and for the value of the rents and profits. *Tewksbury v. O'Connell*, 25 Cal. 264; *Watson v. Whitney*, 23 Cal. 375.

17. In such actions damages may be assessed, both for waste and injury, and for the value of the rents and profits. *Id.*

18. In forcible entry and detainer, if the proofs show that plaintiff was ousted from a portion only of the tract of land described in the complaint, he is not entitled to recover damages for the detention of the whole. *Thompson v. Smith*, 28 Cal. 527.

19. A judgment for damages in forcible entry and detainer bears interest at the rate of ten per cent. per annum from the time it is entered, whether it is so provided in the judgment or not; and the insertion of a clause in the judgment making it bear such interest is merely surplusage and not erroneous. *Burke v. Carruthers*, 31 Cal. 468.

20. The plaintiffs cannot prove damages sustained by the defendants holding over in respect to their property immediately adjoining the demised premises, respecting which

the relation of landlord and tenant was not subsisting. *Kower et al. v. Gluck et als.*, October T., 1867.

21. *Rents and profits.*—As the right to the possession of the premises is not in issue in an action for forcible entry and unlawful detainer, if it is found that at the time of the alleged forcible entry the plaintiff had the actual and peaceable possession, and that the defendants unlawfully detained the premises, the plaintiff is entitled to recover the monthly rents and profits during the time of the unlawful detainer, without regard to the nature or the extent of the right or title by which he held the possession. *Ross v. Duane*, 27 Cal. 568.

22. In an action of forcible entry and detainer the value of the rents and profits of the premises is not required by the statute to be stated in the complaint, and without such statement may be awarded as damages. *Holmes v. Horber*, 21 Cal. 58.

23. Costs should not be adjudged to be paid in gold coin. *Moore v. Del Valle*, 28 Cal. 170.

§ 13. *Proceeding same as in civil cases; appeal shall not stay writ of restitution.*

The proceedings in or upon the trial of any such action shall be the same as in other civil cases, except as herein otherwise provided, and judgment shall be entered, execution issued, and all other proceedings, both before and subsequent to judgment, be had as in other civil cases; *provided*, that no appeal taken by a defendant in such action to the Supreme Court shall prevent the issuance and execution of the writ of restitution therein unless the County Judge shall by his written order direct that such writ of restitution be stayed.

§ 14. *Court Commissioner.*

Any duly appointed Court Commissioner of a county may perform any and all of the duties in this act required to be performed by the County Judge, whenever such Commissioner is authorized by law to perform such duties.

§ 15. *What acts repealed.*

All acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; *provided*, this section shall not in any way affect or apply to actions or proceedings commenced or pending before this act goes into effect, but the same may be prosecuted and proceeded in to final judgment or otherwise, in the same manner as if this act had not been passed.

AN ACT
CONCERNING FORCIBLE ENTRIES AND UNLAWFUL
DETAINERS, AND TO REPEAL ALL OTHER ACTS
ON THE SAME SUBJECT.†

[Approved May 27, 1863.]

*The People of the State of California, represented in Senate and Assembly, do
enact as follows :*

1 § *How entry may be made.**

No entry shall be made into any lands, tenements, or other possessions, but in cases where entry is given by law, and in such case only in a peaceable manner ; not with strong hand, nor with a multitude of people.

* ACT OF 1861, CHAPTER CCCCXLII, 514.

[Approved May 18th, 1861.]

Act relating to the Rights and Duties of Landlords and Tenants.

§ 1. Wherever there is a tenancy at will, or by sufferance, created by the tenant's holding over his term, or otherwise, the same may be terminated by the landlord's giving one month's notice in writing, to the tenant, requiring him to remove from the premises.

§ 2. Such notice shall be served by delivering the same to such tenant, or to some person of proper age residing on the premises; or, if the tenant cannot be found, and there be no such person residing on the premises, such notice may be served by affixing the same on a conspicuous part of the premises, where it may be conveniently read.

§ 3. At the expiration of one month from the service of such notice, the landlord may re-enter, or maintain ejectment, or proceed in the manner prescribed by law to remove such tenant, without any other or further notice to quit.

§ 4. If any tenant shall give notice of his intention to quit the premises by him, his heirs, and shall not accordingly deliver up the possession thereof, at the time in such notice specified, such tenant, his executors or administrators, shall, from thenceforward, pay to the landlord, his heirs or assigns, double the rent which he should otherwise have paid, to be sued for and recovered at the same time and in the same manner, as the single rent; and such double rent shall be continued to be paid during all the time such tenant shall continue in possession, as aforesaid.

§ 5. If any tenant, or any other person, who may have come into the possession of lands or tenements under or by collusion with such tenant, shall willfully hold over any lands or tenements, after the termination of such term, and after demand made, and one month's notice in writing, given in the manner hereinbefore prescribed, requiring the possession thereof by the person entitled thereto, such person holding over shall pay to the person so kept out of possession, or his representatives, at the rate of double the monthly value of the lands or tenements so detained, for so long a time as he shall hold over or keep the person entitled out of possession: and shall also pay and remunerate all special damages whatever to which the person so kept out of possession may be subjected by reason of such holding over; and there shall be no relief in equity against any recovery had at law under this section. *Tinsbury v. O'Connell*, 26 Cal. 264; *Urbina v. Morrell*, 25 44 26; *Ross v. Roberts*, 24 Cal. 128.

§ 6. Much of this act as is inconsistent with, or repugnant to, the forcible entry and detainer act, passed April 1, 1860, is repealed. See ante p. 1, § 15.

For an act preserving the rights of parties existing on the 31st day of December, 1863, under laws then in force relating to forcible entries, etc., see stat. 1863-4, 393. For a construction of this act, see *McNees v. Finn*, 21 Cal. 123.

The act entitled "an act concerning unlawful holding over of lands, tenements and other possessions," passed April 17, 1862—statute 1862, 646—was declared unconstitutional, in *Campbell v. Swanee*, 26 Cal. 118. See *Constitution v. E. E. & A. W. & M. Co.*, 20 Cal. 277.

§ 2. *Possession to be restored.*

Where any such forcible entry shall be made, or where the entry shall be made in a peaceable manner, and the possession shall be held by force, the person so forcibly put out, or so forcibly holden out of possession, shall be restored to such possession by action to be commenced and prosecuted as in this act provided.

§ 3. *Unlawful detention.*

It shall be unlawful for any person to hold over any lands, tenements, or other possessions, after the termination of the time for which they may have been demised or let to him or her, or to the person under whom he or she holds possession, or contrary to the covenants of the lease or agreement under which he or she holds, or after any rent shall become due according to the terms of such lease or agreement, and shall remain unpaid for the space of three days after the same shall become due as aforesaid.

1. *When and by whom the action may be maintained.*—If a landlord sells the leased property and assigns to the purchaser the lease, and the tenant does not attorn to the purchaser, or recognise him as landlord, the purchaser cannot recover possession of the premises from the tenant under the act concerning forcible entries and unlawful detainers. *Reay v. Cotter*, 29 Cal. 168.

2. The right to remove a tenant under the act concerning forcible entries and unlawful detainers is given to the conventional landlord alone, and not to his successor in the estate. *Id.*; *Owen v. Doty*, 27 Cal. 502.

3. When the technical relation of landlord and tenant has been created by lease, the relation is not dissolved by the execution of papers intended as an assignment of the lease to the landlord, and release and cancellation of the lease. A surrender, in fact, of the demised premises is essential to the completion of a dissolution of that relation. A possession by the tenants, after the execution of the papers mentioned, of the demised premises renders them liable to be proceeded against under the act concerning forcible entries and unlawful detainers. *Koser et al. v. Gluck et al.*, Oct. T. 1887.

4. The tenant cannot, by submitting to being wrongfully turned out of possession under a writ which did not run against him, and then attorning to the plaintiff in the writ, prevent his first landlord from recovering possession against him for non-payment of rent. *Caldwell v. Peyser*, 31 Cal. 333.

5. *Relation of landlord and tenant, proof of.*—The production of a lease in evidence will not, of itself, prove the relation of landlord and tenant to have existed between the lessor and lessee, but the entry of the lessee under the lease, or a holding by him referable to the lease, must also be proven. *Caldwell v. Center*, 30 Cal. 539.

6. A., who claimed to be in possession of a tract of coal-bearing land, made a verbal agreement with B. and C. by which they were to prospect for coal until they struck a particular seam or ledge, and before they struck this ledge they were to do all the work and have two-thirds of the claim; but after the ledge was struck the work was to be prosecuted by the parties jointly—A. to bear one-third of the expenses and B. and C. two-thirds: *Held*, that this agreement did not create the relation of landlord and tenant between A. and B. and C., but that it made them tenants in common, or partners in mining, and that the action of unlawful detainer was not the proper remedy for A., if excluded from the premises by B. and C. *Id.*

§ 4. *Demand of possession, and proceedings thereon.*

In all cases specified in the preceding section, the landlord may, at any time within one year after such rent shall become due and remain unpaid, or after any holding over contrary to the terms of such lease, make demand in writing, of such tenant or tenants that he, she, or they, deliver the possession of the premises held as aforesaid; and if such tenant or tenants shall refuse or neglect, for the space of three days after such demand, to quit the possession of such lands or tenements, in case the term has expired, or the covenants or conditions of the lease require said premises to be surrendered, or to pay the rent, in case the term has not expired, but rent remains unpaid, then such tenant or tenants shall be deemed guilty of an unlawful detainer.

1. *Notice to quit.*—By the terms of an award which was decisive between a landlord and his tenant, the latter was to leave the premises on the ninth: *Held*, that the plaintiff had no right to give notice to quit until the tenth. After which, by the Act of Forcible

Entry and Detainer, the plaintiff had six days to remove, wherefore the action commenced on the tenth was premature. *Ray v. Armstrong*, 4 Cal. 208.

2. In an action by a landlord against his tenant, under the thirteenth section of the Forcible Entry and Detainer Act, where the evidence showed a tenancy from year to year, plaintiff must show that he has terminated the tenancy by notice to quit; and if the tenant be permitted to hold over without notice to quit, a new term is created, and he cannot be legally dispossessed. *Sullivan v. Cary*, 17 Cal. 80.

3. When the notice to quit, in order to enable the landlord to determine the tenancy, is served on the original lessee, that notice binds the under-tenants who acquire possession from the tenant after its service. *Schilling v. Homes*, 28 Cal. 227.

4. Those who lease from the tenant, after the landlord has served on him notice to quit, are liable to the landlord for double the monthly value of the premises. *Id.*

5. **Tenant—when not entitled to notice.**—Where the defendant held as tenant under J. S., in his lifetime, under whom, as heir-at-law, the plaintiff claimed as landlord, but the defendant refused to recognize him as such: *Held*, that this refusal terminated the tenancy, and overweighed the presumption of a contract between him (defendant) and the plaintiff. *Sampson v. Shaeffer*, 3 Cal. 190.

6. In an action for unlawfully holding over after the expiration of the tenant's term, three days notice is all that is required. *Garbrell v. Fitch*, 6 Cal. 189.

7. Defendant answers; denying, among other things, plaintiff's title, and his own relation of tenant: *Held*, that plaintiff is entitled to recover; that the denial of title and the relation of tenant made defendant a trespasser, not entitled to notice to quit: that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title and yet claim the benefit of holding in subordination to it. *Smith v. Ogg Shaw*, 16 Cal. 55.

8. **Demand of rent and delivery of possession may be made at the same time.**—If a tenant holds over after rent has become due and remains unpaid for the space of three days; a demand by the landlord of the payment of rent and delivery of possession, both made at the same time, will enable him to maintain an action for unlawful holding over. It is not necessary to demand rent and wait three days, and then demand possession. *Brumagim v. Spencer*, 29 Cal. 661.

9. A waiver of the demand will never be implied for the purpose of making a forfeiture; for from its very nature, a forfeiture cannot take place by consent, and is not favored by the rules of law. *Gaskill v. Trainer*, 3 Cal. 384.

§ 5. Demand for rent may be made at any time.

It shall not be necessary in order to work a forfeiture for the non-payment of rent, to make demand for rent on the day on which the same becomes due, or at any particular time of the day, but demand may be made of the tenant, in person, at any time within a year after such rent shall become due according to the terms of any lease or agreement, and may be made for the whole amount due and unpaid at the time of making such demand. And the failure on the part of the lessee or his assigns to pay such rent upon such demand being made, shall have the same force and effect as if such demand had been made on the premises toward sunset on the day when the rent became due.

§ 6. Landlord to give notice when terms of lease are changed.

In all leases of lands or tenements, or any interest therein, from month to month, the landlord may, and it shall be lawful for him, upon giving notice, in writing, at least fifteen days before the expiration of the month, to change the terms of the lease, to take effect at the expiration of said month. Said notice, when served upon the tenant, shall of itself operate and be effectual to create and establish, as a part of the lease, the terms, rent, and conditions specified in said notice, if such tenant shall continue to hold such premises after the expiration of said month. In all leases of lands or tenements, or any interest therein, for a month, or any term less than one year, and the tenant holds over his term by consent of his landlord, the tenancy shall be construed to be a tenancy from month to month, or a tenancy for such term less than a year, as the case may be.

§ 7. Court having jurisdiction.

Actions for the recovery of the possession of any lands or tenements specified in this act, and for damages consequent upon any forcible entry, or forcible detainer, or rent due, or damages accruing for holding over or not surrender

An Act to amend an Act entitled "An Act concerning Forcible Entries and Unlawful Detainers, and to repeal all other Acts on the same subject." Approved April 27, 1863.

§ 1. Section nine of said Act is hereby amended so as to read as follows:

SEC. 9. Upon filing with the County Clerk of the proper county a complaint duly verified, the Clerk shall at the request of the plaintiff or his attorney, issue a summons thereon directed to the defendant, requiring him to appear and answer in said action within three days after service of summons. The summons shall be served by delivering a copy thereof upon the occupant of the premises described in the complaint, or by leaving such copy on the premises in a conspicuous place. Any demurrer or other objection filed before answer may be heard on one day's notice, and a copy of any pleading filed by the defendant shall be served on the same day on the plaintiff or his attorney. If the demurrer be filed on the day for answering it shall be heard at once, or not later than 10 o'clock A. M. of the next day. If the demurrer be overruled, the defendant shall answer on the same day. If it be sustained, the plaintiff shall file an amended complaint within three days thereafter, and the defendant shall answer the same within three days after the service upon him or his attorney of a copy of the same. The answer shall be verified, and shall contain a specific denial of each material allegation of the complaint. At 10 o'clock A. M. on the day after the expiration of the time within which the defendant should answer the original complaint of plaintiff, the County Judge shall attend at the county court-room and open court; and if the defendant shall have failed to answer or demur to the complaint, he shall upon satisfactory proof thereof order such judgment as shall be just in the premises. If the defendant shall have answered or demurred, the Judge shall set a day for the trial of the action, which shall be within not more than two weeks from the day of service of the summons. If a jury shall have been demanded in writing, he shall order the Clerk to issue a venire for a special trial jury to be summoned for the day fixed by the Court. The jury shall be summoned in the same manner, and possess the qualifications and be subject to the same challenges as provided in Section twenty-eight of an Act entitled "An Act concerning Grand and Trial Juries," approved April twenty-seventh, eighteen hundred and sixty-three. All proceedings other than the trial of the cause may be heard in chambers or in open court. If a jury be demanded, the demand shall be in writing filed at the time of the issuance of the summons, if demanded by the plaintiff, or at the time of filing the answer or demurrer if demanded by the defendant, and shall specify the number, not less than three, demanded. If the parties disagree as to the number of the jury, the Court shall determine the same. The demand in all cases shall be accompanied by the proper jury fee, otherwise a jury trial shall be deemed to have been waived.—Approved March 11, 1872—took effect 30 days after passage.

and that plaintiff was entitled to recover. *Huff v. Baum*, 21 Cal. 120.

4. One of the most important duties of a tenant is to peaceably and quietly surrender the premises to the landlord as soon as the tenancy has expired. *Schilling v. Helms*, 23 Cal. 227.

5. If a stranger intrudes on the premises and takes possession, either forcibly or otherwise, it is the duty of the tenant to take proper legal proceedings to regain the possession so that he may surrender the same to the landlord. *Id.*

6. The tenant is liable to pay rent until he has restored full and complete possession to the landlord, and his liability to pay the rent is not discharged by an eviction, unless under a title superior to the landlord's, or by some agency of the landlord's. *Id.*

7. If the tenant is evicted by a wrong doer, the landlord is not bound to indemnify him. *Id.*

8. If the landlord does so enter and eject the tenant, the tenant may recover damages for the vegetables and grape vines growing on the land, and planted by the tenant for sale, he not being permitted to enter and gather them. *Fee v. Brisac*, 15 Cal. 223.

9. The assignee of a lease may discharge himself from all liability under the covenants of the lease, by assigning over, and the assignment over may be to a beggar, a femme covert, or a person on the eve of quitting the country for ever, provided the assignment be executed before his departure; and even though a premium is given as an inducement to accept the transfer. *Johnson v. Sherman*, 15 Cal. 287.

10. If the tenant takes a receipt from his landlord, specifying the amount of rent paid, and the length of the term, to commence on the expiration of the lease, the new term will be for the time specified in the receipt. No new tenancy by implication arises in such case. *Blumenberg v. Myers*, 32 Cal. 93.

11. When the lessee holds over and the landlord receives rents after the expiration of the term, a new tenancy arises by implication, subject to the covenants and conditions of the original lease, but the new term is not necessarily for one year. *Id.*

12. If the lessee sub-lets the leased premises for the entire term of his lease from the lessor, no right of entry remains in him upon the expiration of the term. The right entry is in him who holds the reversion. *Id.*

13. If a tenant for one year or more, before the expiration of this term, procures the landlord's receipt for one month's rent, commencing at the expiration of the term, a new tenancy of one year is not thereby created. *Id.*

14. What may be shown in defense.—A tenant may show that his landlord's title has terminated, or that his attornment was made under mistake of facts, or by fraud. *McDevitt v. Sullivan*, 8 Cal. 592; *Tewksbury v. Magrath*, Oct. T. 1867.

15. In an action by a landlord against his tenant, under the thirteenth section of the forcible entry and unlawful detainer act, the latter may defend by showing an eviction under an adverse title in a judicial proceeding, of which proper notice was given to the landlord. *Whelock v. Warschauer*, 21 Cal. 309.

16. Such a defense does not involve any question of title, the effect of an eviction being to dispossess the landlord as well as the tenant, and to relieve the latter from the obligations of his tenancy. *Id.*

17. The rule which estops a tenant from disputing his landlord's title does not prevent him from showing that the tenancy has been determined, and he may treat an eviction with notice, by one having an adverse title, as a termination of the tenancy, and thus resist any claim by the landlord, either for rent or possession. *Id.*

18. The notice by a tenant to his landlord of proceedings to evict him may be oral. *Id.*

19. An eviction of a tenant by title, both legal and paramount to that of the landlord, must of necessity determine the tenancy, and when the title of the landlord is set up in defense of the action, and the landlord appears and defends the action at the request of the tenant, and in his name, he cannot be heard to say in a contest with the tenant that the tenant was not evicted by paramount title. *Whelock v. Warschauer*, Oct. T. 1867.

20. An agreement made by the landlord with the tenant, after the expiration of the lease, that the tenant shall have possession of the premises one year longer, paying therefor a stipulated rent, to be paid if the land is included in a certain survey, vests in the tenant the present right to possess the lands until the expiration of the agreement, and if pleaded, is admissible in evidence as a defense to an action for holding over brought before the expiration of the time specified in the agreement. *Id.*; *Uridias v. Morrell*, 25 Cal. 33.

21. General denial.—Where in such case the complaint verified alleges such demand, and the answer verified, instead of specifically denying the allegation, denies generally "each and every allegation" in the complaint: Held, that this general denial put plaintiff on proof of demand, and of everything necessary to maintain the action. *Sullivan v. Cory*, 17 Cal. 80. [A general denial is no longer sufficient. See post § 14.]

§ 11. Fraud defined.

A defendant shall be deemed guilty of fraud, within the meaning of this act when the forcible entry or forcible detainer are shown to have been made or done in bad faith, and knowing that the said defendant had no legal right to make such entry or detainer.

§ 12. Occupants to be defendants—married women.

No person other than the actual occupants of the premises shall be necessary parties defendant to proceedings specified in this act; and in case a married

woman be a tenant or occupant, and her husband is not a resident of the county in which the premises are situated, her marriage shall not be a defense in such proceedings; but in case her husband be not joined, or unless she be doing business as a sole trader, a judgment against her shall only be valid against property on the premises at the time of the commencement of the action.

§ 13. *When the verdict is for plaintiff—damages.*

If, upon the trial of any action under the provisions of this act, the verdict of the jury, or the finding of the Court, shall be in favor of the plaintiff, and against defendant, the Court shall thereupon enter judgment for the plaintiff to have restitution of the premises, and the jury, or the Court, in case the action is tried without jury, shall also find or assess the damages occasioned to the plaintiff by such forcible entry or forcible detainer, or in case of rent unpaid, the amount of rent then due, and thereupon shall at once enter judgment against the defendant for three times the amount of such damages, or rent, as the case may be, so found or assessed.

§ 14. *Proceedings.*

The proceedings in or upon the trial of any such action shall be the same as in other civil cases, except as herein otherwise provided, and judgment shall be entered, execution issued, and all other proceedings, both before and subsequent to judgment, be had as in other civil cases.

§ 15. *Acts repealed.*

The following acts are hereby repealed, viz: An act concerning forcible entries and unlawful detainers, passed April twenty-second, eighteen hundred and fifty; an act to amend the seventeenth section of an act concerning forcible entry and unlawful detainer, passed April second, eighteen hundred and fifty-two; an act to amend an act concerning forcible entries and unlawful detainers, passed March twenty-sixth, eighteen hundred and fifty-eight; an act amendatory of and supplementary to an act concerning forcible entries and unlawful detainers, passed April twenty-second, eighteen hundred and fifty passed May twentieth, eighteen hundred and sixty-one; an act to amend an act entitled an act concerning forcible entries and unlawful detainers, passed April twenty-second, eighteen hundred and fifty, and an act amendatory of and supplementary to said act, approved May twentieth, eighteen hundred and sixty-one, passed April twenty-fifth, eighteen hundred and sixty-two.

§ 16.

This Act shall take effect on the first day of January, eighteen hundred and sixty-four.

RULES OF THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

- RULE 1.** Admission to practice in the Supreme Court.
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21. Opinions of Supreme Court to be recorded.
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34. Mandamus; application for peremptory writ of, when and how made; when respondent shall serve and file answer.
35. Mandamus; alternative writ of, application for; service and filing of answer.
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37. Mandamus; issues of fact, to be tried by District Court, or referee; argument, when to be heard.
38. Argument in mandamus cases.
39. Mandamus; reviewing proceedings in cases of; peremptory writ; when to issue.
40. Mandamus; affidavits and answer to be printed.
41. Mandamus; proof of service of papers; application for; when heard.

1. A rule of Court which deprives a party of a statutory right is void. *People v. McClellan*.
2. The Appellate Court will not presume what are the rules of the Court below, when they are not in the record. *Warden v. Mendocino County*, 32 Cal. 855.

RULE 1. Admission to practice in the Supreme Court.

Applicants for license to practice as attorneys and counsellors will be examined in open Court on the first day of the term, and on that day only.

RULE 2. Transcript, when to be filed.

In all cases where an appeal has been perfected, and the statement filed (if there be one) thirty days before the commencement of the next succeeding term, the transcript of the record shall be filed on or before the first day of such term.

RULE 3. If transcript be not filed in time, the appeal may be dismissed without notice; cause may be restored; effect of dismissal.

If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed on motion during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party, and unless so restored, the dismissal shall be final, and a bar to any other appeal in the same case.

1. Cases may be reinstated.—The Supreme Court has the power, under its rules, to reinstate cases which have been dismissed at a previous term. *Haight v. Gay*, 8 Cal. 297.

2. An appeal, which had been dismissed for failure to file the transcript in time, was reinstated upon cause shown. *Stack v. Barnes*, 2 Cal. 16.

3. Where an appeal has been dismissed by reason of the failure of the appellant to file the transcript of the record in the Supreme Court within the times required by the rules, the order of dismissal will not be vacated and the appeal restored, unless the appellant shall make it appear, not only that there has been no want of diligence on his part, but also shall show that, at least in the opinion of his counsel, the appeal has been taken in good faith, and that there are substantial errors in the record which ought to be corrected by the Supreme Court. *Hagar v. Mead*, 26 Cal. 599.

4. Judgment of dismissal—effect of.—See *Ante*, §144, note numbers 7, 8,—§346, note numbers 42-54.

RULE 4. Nature of certificate required on motion to dismiss.

On such motion, there shall be presented the certificate of the Clerk below, under the seal of the Court, certifying the amount or character of the judgment, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof, on the adverse party, and the character of the evidence by which said service appears; the fact and date of filing the undertaking on appeal, and that the same is in due form; the fact and time of settlement of the statement, if there be one; and, also, that the appellant has received a duly certified transcript, or that he has not requested the Clerk to certify to a correct transcript of the record; or if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

1. When an appeal is dismissed upon a certificate filed in accordance with Rule IV. of the Supreme Court the same fees must be paid as when a transcript is filed. *Bolander v. Gentry*, 47 T. T., 1868.

RULE 5. Transcript must be printed; size of; pages; lines; folios and type.

All transcripts of records in civil cases hereafter sent to this Court, shall be printed on unruled white writing-paper, ten inches long by seven inches wide, with a margin on the outer edge, of not less than two inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and half inches wide. The folios, embracing ten lines each,

shall be numbered from the commencement to the end, and the number of the folio shall be printed on the left margin of the page. Small pica solid is the smallest letter and the most compact mode of composition allowed.

RULE 6. *Transcript; arrangement of; index to, etc.*

The pleadings, proceedings, and statement, shall be chronologically arranged in the transcript; and each transcript shall be prefaced with an alphabetical index to its contents, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover.

RULE 7. *Transcripts which contain maps or surveys, only one copy necessary.*

Whenever a map or survey forms a part of the transcript, it shall not be necessary to furnish more than one copy thereof, which shall be annexed to the transcript filed with and certified by the Clerk. Reference thereto may be made in the other copies.

1. **Original transcript.**—The Justices of the Supreme Court do not take from the Clerk's office, or examine the original transcript, unless it contains the only copy of a map or survey. *Franklin v. Goodman*, 31 Cal. 455.

RULE 8. *Transcript and other printed documents must conform to the rules, or the same will not be filed.*

No transcript, or other paper, or document, required to be printed, which fails to conform to the requirements of these rules, shall be filed by the Clerk.

RULE 9. *Transcript; number of copies to be furnished, and for whom; service of an adverse party; certificates to; costs of.*

The printed transcript, duly certified to be correct, by the attorneys of the parties plaintiff and defendant, or by the Clerk of the Court from which the appeal is taken, shall be filed in this Court, and the party filing the same shall, at the same time, deposit with the Clerk of this Court seven copies thereof, for the use of the Court, the Reporter, and State Library. When printed by the party, he shall, at or before the time of filing the same, and when printed by the Clerk, as soon as practicable after printed, serve a printed copy thereof on the attorney of the adverse party—and if there be more than one adverse party, appearing by different attorneys, on the attorney of each party so appearing. If a party shall present to the attorney of the adverse party a transcript on appeal, and request his certificate that the same is correct, and said attorney, upon such request, shall, for a period of five days, neglect or refuse to join in such certificate, or, if deemed incorrect, shall neglect or refuse, for the same time to serve upon the party making the request a written statement of the particulars in which the transcript is incorrect, or upon the presentation of the transcript corrected in the particulars thus specified, shall still neglect or refuse, for a period of two days, to join in such certificates, the costs of procuring the certificate to such transcript of the Clerk of the Court from which the appeal is taken, shall be taxed against the party whose attorney so neglects or refuses.

1. **Manner of preparing the transcript.**—See *ante*, § 346 and notes.

2. **Rule IX.** of the Supreme Court is in harmony with the three hundred and forty-sixth section of the Practice Act, as amended in 1864. *Estate of Boyd*, 25 Cal. 512.

3. **Certificate to transcript.**—The object of the rule allowing attorneys to stipulate to the correctness of a transcript, was to enable the attorney for the appellant, with the con-

ment of the opposite attorney, to make up the record, and omit all useless and superfluous matter, and thereby save expense, and facilitate the examination, and hasten the decision of causes. *Id.*

4. **Service of transcript.**—The failure of the attorney for appellant to serve a copy of the transcript upon the attorney for respondent before or at the time of filing, is not a ground for dismissing the appeal, if reasonable diligence is used, but the respondent may object to a hearing at the first term, if service is not made in time for him to prepare for argument. *Id.*

5. When the appellant prints the transcript, service should be made before or at the time of filing, and when sent to the Clerk to be printed, the appellant should direct the Clerk to forward him copies, as soon as printed, for service. *Id.*

RULE 10. *Transcript may be printed by party, or by Clerk of Supreme Court.*

The party filing the transcript may, at his option, print the same or transmit to the Clerk of this Court the written transcript, authenticated in the mode prescribed by Rule IX, together with sufficient funds to pay the expenses of printing. The Clerk, upon the receipt thereof, shall cause the transcript to be printed, and to a printed copy shall annex his certificate that the said printed transcript is a full and correct copy of the transcript furnished to him by the party, and said certificate shall be *prima facie* evidence that the same is correct. That said printed copy so certified shall be filed, and constitute the record of the cause in this Court. Printed copies thereof shall be furnished for each of the Justices of this Court, the Reporter, the State Library, and the attorneys of the adverse party, as required by Rule IX.

RULE 11. *Transcript and pleadings; expense of printing taxed as costs.*

The expense of printing transcripts on appeal, and pleadings, affidavits, or other papers constituting the record in originals, proceedings upon which the case is heard in this Court, required by these rules to be printed, shall be allowed as costs, and taxed in bill of costs in the usual mode.

RULE 12. *Transcript—error in, how shown and corrected.*

For the purpose of correcting any error or defect in the transcript from the Court below, either party may suggest the same in writing, and upon good cause shown, obtain an order that the proper Clerk certify to this Court the whole or part of the record, as may be required. If the attorney or counsel of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

1. Where the record contains a stipulation that there is no error therein to the prejudice of the appellants, provided the title to the whole of a tract of land did not pass by a certain deed in controversy, and the case is argued by appellant's counsel on that theory in his opening brief, and the Court holds that the title to the whole tract did not pass, it will not notice other alleged errors on petition for rehearing. *Hitch v. Courtis*, 81 Cal. 898.

2. On motion to dismiss an appeal on the ground that an undertaking on appeal is not shown by the transcript to have been filed, the appellant may suggest a diminution of the record, and obtain an order directing the Clerk of the Court below to certify a copy of the undertaking to the Appellate Court. *Wakeman v. Coleman*, 28 Cal. 58.

3. See ante § 346, note No. 40.

RULE 13. *Transcript; objections to must be filed before argument.*

Exceptions to the transcript, statement, bond or undertaking on appeal, the notice of appeal, or to its service, or proof of service, or any technical objection to the record, affecting the right of the appellant to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writing and filed at least one day before the argument, or they will not be regarded. In such case the objection must be presented to the Court before the argument on the merits.

1. Appeal dismissed under peculiar state of facts. See *Lynch Adm'r v. Dunn*, Jan. T., 1888.
2. The objection that the transcript does not contain all that is required by the 340th section of the Practice Act must be made before the argument, so that appellant may have an opportunity of supplying the missing papers. *Solomon v. Reese*, Oct. T., 1887.

RULE 14 *Death or disability of a party pending an appeal; representative may be substituted.*

Upon the death or disability of a party pending an appeal, his representative shall be substituted in the suit, by suggestion in writing, to the Court, on the part of such representative, or of any party on the record. Upon the entry of such suggestion an order of substitution shall be made, and the cause shall proceed as in other cases.

1. The death of an appellant after argument of his case on appeal does not constitute any ground for delaying a decision or departing from the ordinary course of procedure, except as to the entry of judgment which may be rendered. The entry should be a day anterior to the appellant's death. *Black v. Shaw*, 20 Cal. 68.

2. The rule is different if the death occurs previous to the argument; in that event further proceedings can only be had upon leave given after suggestion of the death is made. *Id.*

3. Where, after the death of the appellant, the Appellate Court not being aware of the death, rendered a judgment of affirmance, upon subsequent suggestion of the fact the judgment will be vacated and a judgment of affirmance rendered as of a day previous to the death, *nunc pro tunc*. *Id.* *Saving and Loan Society v. Gibb*, 31 Cal. 609.

RULE 15. *Calendar of Supreme Court; what causes it shall contain.*

The calendar of each term shall consist only of those causes in which the transcript shall have been filed and served on the attorneys of the adverse party, five days before the commencement of the term, unless by written consent of the parties; *provided*, that all cases in which the appeal is perfected and the statement settled, as provided in Rule II, and the transcript is not filed and served five days before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

RULE 16. *Calendar, causes from districts placed together; San Francisco and Sacramento causes, where placed.*

Causes from the same Judicial District shall be placed together, and all the causes shall be set on the calendar in the order of the several districts, commencing with the first, except that the calendar shall end with the Sacramento causes, preceded by those of San Francisco; and except, also, that causes in which the people of the State are a party, shall be placed at the head of the calendar.

RULE 17. *Points and authorities to be furnished by appellant and respondent to each other one day before argument; number, to be furnished Clerk, and for whom.*

In civil cases, at least one day before the argument, both the appellant and respondent shall furnish to each other a printed copy of his points and authorities; and at or before the commencement of the argument, shall deposit with the Clerk one printed copy for each of the Justices of this Court, one to be filed with the record of the case, one for the Reporter, and one for the State Library.

1. **Appellant's points.**—Points upon which the appellant relies to reverse the judgment, should be made in his opening brief. *Ellis v. Curtis*, 31 Cal. 398.

2. **Failure to file briefs.**—Where a cause is submitted on briefs to be filed in a specified time, and no briefs are filed within the time, and the transcript contains no assignment of error, the judgment will be affirmed. *Hickenbotham v. Monroe*, 28 Cal. 439; *Hahn v. Roach et al.* 26 Cal. 37; *Edmondson v. Alameda Co.*, 24 Cal. 349.

3. When an appeal is taken on the judgment roll alone, and no statement is made, a specification of grounds of error is not required to be inserted in the transcript. But when the Court comes to examine the case, and no brief or statement of points and authority has been furnished by the appellant, as required by Rule XVII, the judgment will be affirmed without examination. *Hutton v. Reed, et al.*, 25 Cal. 483.

RULE 18. *Briefs must be printed; number of copies, and for whom furnished.*

In all civil cases, when briefs or arguments are filed, the same shall be printed, and one copy shall be filed in the case, and seven copies for the use of the Court, Reporter, and State Library, shall at the same time be deposited with the Clerk, and a copy shall be served on the attorney of the adverse party.

RULE 19. *Of other printed documents; requisites of, etc.*

In all cases where a paper or document is required by these rules to be printed, it shall be printed upon similar paper, and in the same style and form (except the numbering of the folios in the margin) as is prescribed for the printing of transcripts.

RULE 20. *Two counsel only to be heard on each side; appellant's counsel entitled to open and close the argument; each allowed one hour.*

No more than two counsel on a side will be heard upon the argument, except in peculiar and important cases; but each defendant who has appeared separately in the Court below, may be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument. Each counsel will be allowed one hour.

RULE 21. *Opinions of Supreme Court to be recorded.*

All opinions delivered by the Court, after having been finally corrected, shall be recorded by the Clerk.

RULE 22. *Motion for rehearing, made upon printed petition, to be filed within fifteen days after rendition of judgment; exceptions to the above; stay of proceedings, etc.*

All motions for a rehearing shall be upon petition, which shall be printed and filed within fifteen days after the judgment is rendered, or order made, except in cases from the First, Eighth and Ninth Judicial Districts, in which the petition shall be presented within twenty-five days after the judgment or order. No argument will be heard upon petition. The petition shall operate as a stay of proceeding until the decision of the motion, or until further order of the Court; and no petition for rehearing shall be filed by the Clerk after the expiration of the time prescribed by this rule, or such further time as shall have been allowed by this Court, or three of the Justices thereof.

1. *Rehearing.*—This Court may, after its judgment has been pronounced, direct a rehearing at any time before the remittitur has been sent to and filed in the Clerk's office of the Court below; after that has been done, the jurisdiction of this Court to order a rehearing ceases—but *Held*, that after an order had been made granting the rehearing, and the remittitur was filed with the Court below, the jurisdiction to reconsider the cause was not taken away. *Grogan & Lent v. Eockie*, 1 Cal. 153.

2. On a rehearing, a party will not be permitted to raise any point which was not urged on the first argument. *Id.*

3. Hereafter, the rule is established that rehearings will not be granted with the same indulgence as formerly. *Andrews v. Mot. Hill Co.*, 7 Cal. 330.

4. A refusal to give an instruction cannot be urged as error for the first time on a petition for rehearing in the Supreme Court. *Payne & Dewey v. Treaswell*, 16 Cal. 220.

5. The employment of new counsel, after decision rendered, is no ground for an extension of the time prescribed by the rules of the Court for filing a petition for a rehearing. *Ferris v. Coover*, 10 Cal. 589.

6. A cause cannot be reheard in the Supreme Court on application of counsel, except

upon petition filed, and the party applying for the rehearing should include in his petition all the grounds upon which the rehearing is claimed, and those not included are deemed waived. *Wilson v. Breder*, 24 Cal. 190.

7. An equal division of the Justices of the Supreme Court upon the question of granting a rehearing is a denial of the rehearing asked for. *Ayres v. Bensley*, 32 Cal. 632.

8. Where a cause in the Supreme Court is submitted on briefs, the order of submission providing that a copy of the briefs be served on the opposite party, he to have a certain time thereafter to answer, and no copy is served, and the Court decides the case against him without any brief on his part, a rehearing will be granted on his application without reference to the merits of the case. *Patterson v. Ely*, 18 Cal. 28.

9. **Modification of judgment on petition for rehearing.**—It is not the practice of the Supreme Court to make a material modification of the judgment rendered by that Court on a petition for rehearing, but if made at all it is to be done after a hearing is granted. *Argenti v. City of San Francisco*, 30 Cal. 458.

RULE 23. *Remittitur ; when may issue.*

No remittitur shall issue until after the expiration of the time allowed by the last rule to file a petition for rehearing, unless otherwise ordered by the Court.

1. **Stay of remittitur.**—The presiding Judge of the highest Court in a State has no power to grant a stay of proceedings on a judgment rendered in that Court until an application can be made to some Justice of the Supreme Court of the United States to issue a citation on a writ of error. *Greely v. Townsend et al.*, 28 Cal. 614. See *ante*, § 345, note number 142.

RULE 24. *Time for notice of motion, five days, may be shortened; exceptions as to certain localities.*

In all cases where notice of a motion is necessary, unless for good cause shown the time is shortened by an order of one of the Justices of this Court, the notice shall be five days, if the attorney upon whom service is to be made resides north of an east and west line drawn one hundred and twenty-five miles south of Sacramento, and south of a similar line drawn at the same distance north of Sacramento, and ten days if such attorney resides without said limits.

RULE 25. *Proceedings on reversal of judgment.*

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the Court below.

RULE 26. *No papers to be withdrawn without order.*

No paper shall be taken from the Court-room or Clerk's office, except by order of the Court, or of one of the Justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the Clerk.

RULE 27. *Writs of error and certiorari; when and how may be issued.*

No writ of error or certiorari shall be issued, except upon order of one of the Justices, upon petition, showing a proper case for issuing the same.

RULE 28. *Writ of error, undertaking on; notice of, etc.*

When a writ of error is issued, upon filing the same, and a sufficient bond or undertaking, with the Clerk of the Court below, and upon giving notice thereof to the opposite party or his attorney, and to the sheriff, it shall operate as a supersedeas. The bond, or undertaking, shall be substantially the same as required in cases on appeal.

RULE 29. *Writ of error returnable in thirty days.*

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE 30. *"Practice," as to writ of error.*

The rules and practice of this Court respecting appeals shall apply, so far as the same may be applicable, to proceeding on a writ of error.

RULE 31. *Writ of error not allowed after one year from rendition of judgment.*

The writ shall not be allowed after the lapse of one year from the date of the judgment, order, or decree, which is sought to be reviewed, except under special circumstances.

RULE 32. *When causes are placed on the calendar; parties liable for costs.*

When causes are placed upon the calendar, parties shall be primarily liable for costs as follows: 1st, If by the appellant, he shall first be liable; 2d, If by the respondent, or by counsel, then both parties. In no civil case shall the Clerk be required to remit the final papers until the costs are paid.

RULE 33. *Cause may be brought to hearing; effect of non-appearance.*

All causes regularly on the calendar may be brought to a hearing by either party, when called in their order, upon the day for which said causes have been previously set, or as soon thereafter as they may be reached in the regular call, without further notice than is contained in the apportionment of the calendar made by the Clerk or Court; and on such call of the calendar, if no counsel appears for the appellant, and no brief or statement of points and authorities on behalf of appellant is on file, the appeal will be dismissed, or judgment affirmed, in the discretion of the Court, on motion of respondent.

RULE 34. *Mandamus; application for peremptory writ of, when and how made; when respondent shall serve and file answer.*

All applications to this Court for peremptory writs of mandate will be noticed for the first day of the term. The notice shall require the respondent to serve and file his answer within the time hereinafter specified, and notify him that if he fails to answer within the time prescribed, the application will be heard on the moving papers on the first day of the next term. Where the respondent resides in the Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, Twelfth, Fourteenth or Fifteenth Judicial District, a notice of the application, together with a copy of the affidavit and other papers upon which the application will be based, shall be served on the respondent at least fifteen days before the said first day of the term; and where the respondent resides in any other Judicial District, twenty days before said day. As soon as practicable after such service the said notice, affidavit and other papers, together with the evidences of service, shall be filed by the applicant with the Clerk of this Court. Within fifteen days after service of said affidavit and notice, in all cases wherein a notice of fifteen days is required, and within twenty days in all other cases, the respondent shall file his answer and serve a copy thereof on the applicant or his attorney.

RULE 35. *Mandamus; alternative writ of, application for; service and filing of answer.*

When the application is for an alternative writ, the affidavit upon which the

application is made shall be filed with the Clerk of the Court before the issuing of the writ, and a copy of the same shall be served with the writ. The writ shall command the party to do the act required to be performed, or show cause why he has not done so by filing his answer thereto within the time to be specified in said writ, as hereinafter provided, and shall notify the respondent that on failure so to do, the application for the peremptory writ will be heard on the papers of the moving party on the first day of the next succeeding term, or upon such day in term as may be appointed by the Court, when a special return day has been inserted by order of Court. If the respondent resides in any one of the Judicial Districts mentioned by their respective numbers in Rule 34, the return day specified in the writ shall be fifteen days after service of a copy of the writ and affidavit aforesaid; if a resident of any other Judicial District, twenty days; or if the Court, by order, appoint a special return day, then the day so appointed. Within the time so designated for the return of said writ, the respondent shall either do the act required to be performed, or file with the Clerk of this Court his answer to the writ and affidavit, and serve a copy thereof on the applicant for said writ.

RULE 36. *Mandamus; proceedings relating to; preliminary motions heard first day of the term.*

In proceedings relating to writs of mandate, preliminary motions necessary to be disposed of before the cause is placed upon the calendar for final argument will be heard on the first day of the term.

RULE 37. *Mandamus; issues of fact, to be tried by District Court, or referee; argument when to be heard.*

If in such proceedings an answer be filed which raises an issue of fact essential to the determination of the application, the question of fact will be directed to be tried by a jury before some District Court, to be designated in the order, or where the parties so agree, by a referee; and the argument will be postponed till the verdict or finding upon such issue of fact shall be duly certified to this Court.

RULE 38. *Argument in mandamus cases.*

The final argument in proceedings for writs of mandate, whether upon questions of law arising on the papers in the case, or upon the facts as found by a jury or referee, will be heard on Monday of the second week of the term. A calendar of such cases will be made out for that day, upon which the Clerk will place all applications for mandates ready for final hearing. All applications for writs of mandate not ready for hearing on said day, (unless for special reasons otherwise directed) will be continued to the next succeeding term of the Court.

RULE 39. *Mandamus; reviewing proceedings in cases of; peremptory writ; when to issue.*

Hereafter the mode of reviewing the decisions of this Court in proceedings for writs of mandate will be by petition for rehearing, filed within the same time and in the same manner as in cases determined in this Court on appeal, and not by motion for new trial. But when a peremptory writ is awarded, it shall issue immediately, unless stayed by special order of the Court.

RULE 40. *Mandamus affidavits and answer to be printed.*

The affidavits upon which the application for the writ is made, and the answer of the respondent, shall be printed in the same manner as transcripts on appeal are required to be printed.

RULE 41. *Mandamus ; proof of service of papers ; application for ; when heard.*

The proof of service of notice and affidavits, or writ and affidavits shall be the same as the proof of service of summons in civil cases. After the return day has passed, upon filing due proof of service of notice and affidavits in an application for a peremptory mandate, or of the affidavits and alternative writ, when the alternative writ has been issued as provided by these rules, and that no answer has been served and filed as herein provided, upon the application of the moving party the Clerk shall place the cause upon the calendar for hearing on the first day of the term, or such other day as may be specially appointed by the Court, upon the papers of the applicant, and the application shall be heard upon such papers unless the Court, upon motion on notice and affidavits, shall relieve the respondent from his default and permit an answer to be filed on the ground of mistake, accident, surprise or other excusable neglect.

Ordered, that the foregoing be and the same are hereby adopted as rules of this Court.

RULES

OF THE FOURTH, TWELFTH AND FIFTEENTH DISTRICT COURTS.

- RULE 1.** Law calendar—when made up ; when called ; when to answer upon overruling of demurrers to first or second week of term.
2. Term trial calendar—what to contain.
3. Equity calendar—when made up—what to contain.
4. Motions—when to be noticed ; what papers to be served ; notice what to specify.
5. Moving party, when entitled to decision : papers to be indorsed and filed by counsel ; Clerk to specify name of such counsel in order entered ; affidavits used on motion to be filed before hearing.
6. Manner of making motions.
7. Opening of Court ; motion days ; motion calendars—order of business on motion day ; memorandum of motion to be handed to Clerk ; calendar *ex parte* motions ; calendar contested motions.
8. Calling of term trial calendar—when called ; manner of application to correct calendar or postpone cause ; when jury may be waived : issues of fact in equity, how tried ; causes not answered to as ready to be continued for the term, or dismissed.
9. Time assigned to trial of jury causes ; day's calendar ; jury causes, when tried ; how many causes set in a day ; when cause called for trial may be dismissed or passed for the term, or dismissed.
10. Equity calendar—when taken up ; causes, when may be dismissed ; when passed or dismissed.
11. Agreements between parties or their attorneys—when regarded.
12. Order of examination of witnesses and summing up on trial of issues of fact.
13. When counsel not to argue or sum up to the jury.
14. It shall not be necessary to call the plaintiff before receiving the verdict of the jury.
15. Application to amend pleadings—what to serve ; verification.
16. Pleadings—to be paged, lines to be numbered ; interlineations.
17. Indorsement on complaint.
18. Motion to strike out part of pleadings—notice, what to specify.
19. Motion to strike out, when to be noticed.
20. Amendment of pleadings, when demurrer sustained—time to amend and serve amendment ; time to demur or answer to amended pleading ; terms may imposed for leave to file ; affidavit of merits by demurring party, when to be filed and served ; on terms.
21. Before.
22. Settlement of statement on motion for new trial.
23. Order to stay proceedings—what to serve to make it effective ; shall be filed ; when order may be disregarded.
24. Action to foreclose a mortgage—reference when defendant fails to answer.
25. Judgment for sale of mortgaged premises in action of foreclosure—judgment, what to contain.
26. Action for divorce—when reference may be ordered.
27. Testimony in divorce cases—by whom it may be examined.
28. Statement for new trial—how made up and served ; how amendments made up and served ; how settled upon notice ; engrossed and filed.
29. Order enlarging time for filing statement—how to be construed.
30. Guardian *ad litem*, qualifications of.
31. Guardian of infant defendant—guardian, duties of.
32. Bond of guardian *ad litem*—bonds, how given.
33. Deposits of money in Court—disposition of moneys.
34. Orders upon depositaries of Clerks—how drawn.
35. Papers belonging to the files not to be withdrawn.
36. Counsel to furnish form of decree.
37. Production of records in Recorder's office.
38. Undertaking on attachment—amount of.
39. Filing an order and affidavit of arrest.

RULE 40. Cancellation of instruments by Clerk—duties of Clerk.

41. Affidavit of merits—what to contain.
42. Writs of attachment, how issued—time of filing to be indorsed on affidavit and undertaking.
43. Court Commissioner—what orders he may grant.
44. Instructions to juries.
45. Intervention—when to be verified; when affidavit required.
46. Commission and interrogatories.

RULE 1. *Law calendar—when made up; when called; when to answer upon overruling of demurrers in first or second week of term.*

The Clerk shall, on the Friday next preceding the commencement of each term, make up a calendar to be known as the "Law Calendar," on which shall be placed all causes in which demurrers, motions for judgments on special verdicts, and motions for new trial are pending, and shall add thereto all such causes which shall arise during the ensuing term, which calendar will be called by the Court on the days known in San Francisco as "Steamer Days," and on the first Tuesday of each term, and from day to day thereafter during the first week of each term until disposed of. In all causes in which demurrers to the complaint shall be overruled during the first or second week of the term, the defendant shall be allowed five days after the entry of the order overruling the demurrer to answer, and the cause shall thereupon be placed on the "Term Trial Calendar" for that term.

RULE II. *Term trial calendar—what to contain.*

A calendar, to be called the "Term Trial Calendar," shall be made up by the Clerk on the last Tuesday preceding the first day of each term. It shall contain all causes in which issues of fact shall have been joined on or before that day; also, all such as may be ordered thereon by the Court.

RULE 3. *Equity calendar—when made up; what to contain.*

When all causes to be tried by a jury are disposed of, and the jury discharged, or at such other time as the Court may direct, the Clerk shall make up from the Term Trial Calendar, in the order of their date of issue, a calendar of equity causes and causes, which have been reserved for trial by the Court without a jury, which shall be known as the "Equity Calendar." And shall also place thereon all equity causes in which issues of fact shall have been joined during the first two weeks of that term. No more than ten of such causes will be called on one day. Causes not reached on the day set for trial shall have preference on the next day.

RULE 4. *Motions—when to be noticed; what papers to be served; notice, what to specify.*

Motions (where by law notice is required to be given) shall be noticed for a hearing at least five days before the day specified for hearing; and a copy of all papers to be used by the moving party (except pleadings or other records of the Court), shall be served with the notice of motion. The notice of motion shall specify the papers to be used by the moving party, and the grounds of the motion.

RULE 5. *Moving party, when entitled to decision; papers to be indorsed and filed by counsel; clerk to specify name of such counsel in order entered; affidavits used on motion to be filed before hearing.*

Upon reading and filing the notice of motion, with proof, by affidavit or

otherwise, of the service of the same and of the papers mentioned therein, if no one appears to oppose the motion, the moving party shall be entitled to a decision upon the order asked for therein. The counsel for the party succeeding upon any motion shall indorse his name upon the papers used on the motion, and file the same, and the Clerk shall specify the name of such counsel in the order or rule entered. Upon the hearing, the affidavits to be used by either party shall be indorsed by the Clerk and filed before the affidavits shall be used.

RULE 6. *Manner of making motions.*

The manner of making motions shall be as follows: 1. The moving party shall read the moving papers, or state the contents thereof. 2. The party opposing shall then read or state the contents of his opposing papers; the counsel for the moving party shall then make his argument, to be followed by the counsel of the opposing party; and the counsel for the moving party may, in the discretion of the Court, reply.

RULE 7. *Opening of court; motion days; motion calendars—order of business on motion day; memorandum of motion to be handed to clerk; calendar *ex parte* motions; calendar contested motions.*

The Fourth, Twelfth, and Fifteenth District Courts will open on Saturdays during the terms thereof, which days shall be known as motion days in said Courts.

On "Motion Day" the order of business shall be as follows:

1. *Ex parte* motions.
2. Contested motions.

Hereafter, attorneys having motions on motion day will be required to hand to the Clerk a memorandum, containing the title of the cause in which the motion will be made, and the name of the attorney moving; also, designating the motion as "*ex parte*" or "contested," as the case may be. The Clerk will make up two calendars from the memoranda so furnished, one of "*ex parte*" and the other of "contested" motions—the several causes to be placed on the calendar in the order in which they are received by the Clerk. The calendar of "*ex parte*," motions will be called first, and then the "contested" motions; and no motions will be heard, except those on the calendars, until all the calendar motions are disposed of. The memoranda may be handed to the Clerk at any time during the week, and up to the opening of the Court on motion days.

RULE 8. *Calling of term trial calendar—when called; manner of application to correct calendar or postpone cause; when jury may be waived; issues of fact in equity, how tried; causes not answered to as ready, to be continued for the term, or dismissed.*

The whole Term Trial Calendar will be called in the Fourth, Twelfth, and Fifteenth District Courts on the first day of each term, when must be made all motions to correct the calendar, and all motions to postpone causes to a day certain on account of witnesses residing beyond the reach of a subpoena; which application must when required by the opposite party, be made upon affidavits setting forth the materiality of the evidence, and that such witnesses are willing or have agreed to attend the trial.

A trial by jury may be waived and a cause reserved for trial by the Court without a jury, at any time during the term before, or at the time said cause is reached in its order upon the calendar.

All issues of fact in equity causes shall be tried by the Court, when such causes are called in their order on the "Equity Calendar," unless issues shall have been settled therein previous to the commencement of the term. Issues of fact shall be settled by the Judge or Court, or by the Court Commissioner, on the order of the Court. Any cause which is not answered to as ready for trial by either plaintiff or defendant, will be passed and continued for the term, or dismissed in the discretion of the Court for want of prosecution.

RULE 9. *Time assigned to trial of jury causes; day's calendar; jury causes, when tried; how many causes set a day; when cause called for trial may be dismissed or passed for the term, or dismissed.*

The second, third, fourth, fifth, sixth, seventh and eighth weeks, if necessary, of every term, shall be devoted to the trial of causes upon the "Term Trial Calendar" to be tried by a jury. No more than ten causes will be set for trial on any one day. Those not acted on, on that day shall be entitled to a preference on the next day; but no more than ten causes shall be called on any one day. If, when any cause shall be regularly called for trial, the plaintiff shall fail to proceed to trial, unless for sufficient cause shown the Court should otherwise order, the defendant may take a dismissal of the action, or apply for such relief as he may be entitled to in his answer. If no counsel shall answer for either party on such call, the cause shall be deemed passed for the term, or dismissed for want of prosecution, in the discretion of the Court.

RULE 10. *Equity calendar—when taken up; causes, when may be dismissed; when passed or dismissed.*

After the Term Trial Calendar shall have been called through and disposed of, the "Equity Calendar" will be taken up for trial. When any cause on such calendar shall be regularly called for trial, if the plaintiff shall fail to proceed to trial, unless for sufficient cause shown the Court shall otherwise order, the counsel for the defendant may take a dismissal of the action, or apply for such relief as he may be entitled to in his answer. If no counsel shall answer for either party on such call, the cause shall be deemed passed for the term, or dismissed for want of prosecution, in the discretion of the Court.

RULE 11. *Agreements between parties or their attorneys—when regarded.*

No agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, will be regarded by the Court, unless the same shall have been made in open Court and entered in the minutes, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same may be alleged, or by his attorney.

RULE 12. *Order of examination of witnesses and summing up on trial of issues of fact.*

On trial of issues of fact, only one counsel on each side shall examine or cross-examine a witness, and only one counsel on each side shall sum up the cause, unless the Court shall otherwise direct. The party having the affirmative shall be entitled to begin, and shall, before introducing his testimony,

open his case by stating generally what he expects to prove. The other party may, either then or after the opening party rests his testimony, state what he expects to prove. After the testimony is closed, the party holding the affirmative may address the jury, and shall, if desired by the opposite party, read and refer to his authorities, and state his points; the party holding the negative of the issue may then sum up his case, and the party holding the affirmative may close.

RULE 13. *When counsel not to argue or sum up to the jury.*

If the attorney or counsel of either party offers himself as a witness on behalf of his client, and gives evidence on the merits, on the trial, he shall not argue the case or sum it up to the jury, unless by consent of the opposite party or permission of the Court.

RULE 14. It shall not be necessary to call the plaintiff before receiving the verdict of the jury.

RULE 15. *Application to amend pleadings—what to serve; verification.*

In cases where the right to amend any pleading is not of course, the party desiring to amend shall serve with the notice of application to amend, an engrossed copy of the pleading, with the amendment incorporated therein, or a copy of the proposed amendment, referring to the page and line of the pleading where it is desired that the amendment be inserted; and if the pleadings were verified, shall verify such amended pleading, or such proposed amendment, before the application shall be heard. No pleading shall be amended by verifying the same, when the original was not verified.

RULE 16. *Pleadings—to be paged, lines to be numbered; interlineations.*

All pleadings shall, before being filed, be paged and the lines numbered. All documents and pleadings, intended for the files of the Court, shall be on paper known as "legal cap," of good quality, and without interlineations, unless noted by the Clerk at the time of filing.

RULE 17. *Indorsement on complaint.*

The plaintiff shall in all cases indorse on his complaint, below the title of the action, the character of the action; that is, whether it be for the foreclosure of a mortgage, replevin, to quiet title to real property, or otherwise, whatever the character may be.

RULE 18. *Motion to strike out part of pleadings—notice, what to specify.*

The party moving to strike out any part of a pleading, shall in the notice of motion distinctly specify the page and lines, or parts of lines, asked to be stricken out.

RULE 19. *Motion to strike out, when to be noticed.*

Motions to strike out any portion of a pleading, must be noticed before answering or demurring to such pleading. The pendency of a motion to strike out any portion of a pleading, shall not enlarge the time to answer or demur without an order of the Judge of the Court, the Court, or Court Commissioners,

RULE 20. *Amendment of pleadings, when demurrer sustained—time to amend and serve amendment; time to demur or answer to amended pleading; terms may be imposed for leave to file; affidavit of merits by demurring party, when to be filed and served; on terms.*

When a demurrer to a pleading is sustained, the adverse party shall have ten (10) days from service of notice of the entry of the order, in which to amend the pleading demurred to, and to file and serve such amended pleading; and the party whose demurrer has been sustained, shall have ten (10) days from such service, in which to answer or demur to such amended pleading. But the Court in granting leave to file such amended pleading, may impose such terms upon the party desiring to amend as it may deem proper. When a demurrer to the complaint has been overruled for want of an appearance of the party demurring, or where, in the opinion of the Court, the demurrer was frivolous, or interposed for delay, leave will not be given to the party to answer such complaint, except upon condition that such party files and serves an affidavit of merits, within five days, or such further time as may be allowed by the Court or Judge thereof, after notice to the adverse party of the demurrer being overruled, and payment of such costs as may have been imposed.

RULE 21. *Referee.*

Upon a reference to try all the issues, both of fact and of law, and to report a judgment thereon, the referee shall set forth in his report the facts found, and the conclusions of law, separately.

RULE 22. *Settlement of statement on motion for new trial.*

Statements on motion for new trial shall be settled by the Judge or referee before whom the cause was respectively tried.

RULE 23. *Order to stay proceedings—what to serve to make it effective; shall be filed; when order may be disregarded.*

An order to stay proceedings in an action shall be of no effect until a copy thereof is served upon the opposite party, or his attorney, and any other party or officer whose proceedings are to be stayed thereby. The original order shall be filed within forty-eight hours after the same was made, or the party on whom the copy was served may disregard the same.

RULE 24. *Action to foreclose a mortgage—reference when defendant fails to answer.*

If in an action to foreclose a mortgage, the defendant fails to answer within the time allowed for that purpose, or the right of the plaintiff as stated in the complaint is admitted by the answer, the plaintiff may have an order referring it to some suitable person as referee, to compute the amount due to the plaintiff and to such of the defendants as are prior or subsequent incumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due. If any of the defendants have been served by publication, the order of reference shall also direct the referee to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent, on oath, as to any payments which have been made, and to compute the amount due on mortgage, preparatory to the application for judgment of foreclosure and sale.

RULE 25. *Judgment for sale of mortgaged premises in action of foreclosure—judgment, what to contain.*

In every judgment for the sale of mortgaged premises in an action for foreclosure, the description and particular boundaries of the property to be sold

so far at least as the same can be ascertained from the mortgage, shall be inserted; and, unless otherwise specially ordered by the Court, the judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to satisfy the amount due to the plaintiff for principal, interest, and costs, and which may be sold separately without material injury to the parties interested, be sold by the sheriff of the county where situate, and that the plaintiff or any other party may become a purchaser on such sale; that the sheriff execute a deed to the purchaser; that out of the proceeds of the sale he pay to the plaintiff, or his attorney, the amount due him, with interest and costs, or so much as the purchase money will pay of the same, and that he take a receipt of the plaintiff, or his attorney, for the amount so paid, and file the same with his report of sale; and that the purchaser at such sale be let into the possession of the premises on production of the deed. In case of a surplus arising from the sale of mortgaged premises under any such judgment, the sheriff shall deposit the same with the Clerk of the Court within five days after such surplus shall have been received, unless the Court otherwise direct.

RULE 26. *Action for divorce—when reference may be ordered.*

When an action is brought to obtain a divorce or separation, or to declare a marriage void, if the defendant fail to answer the complaint, or if the facts charged are not denied in the answer, the Court may order a reference to take proof of all the material facts charged in the complaint.

RULE 27. *Testimony in divorce cases—by whom it may be examined.*

No officer of the Court with whom the proceedings in an action of divorce are filed, or before whom the testimony is taken, nor any clerk of such officer, either before or after the termination of the suit, shall permit a copy of any of the testimony, or of the substance of the details thereof, to be taken or to be inspected or read by any other person than a party or the attorney or counsel of a party who has appeared in the case, without a special order of the Court.

RULE 28. *Statement for new trial—how made up and served; how amendments made up and served; how settled upon notice; engrossed and filed.*

The party preparing a statement for a new trial, shall number the pages and lines of the same, and after having filed the same with the Clerk, and had such filing entered and indorsed, shall serve the same upon the opposite attorney, on the same day, who shall prepare his amendments thereto, referring to the page and line of the statement, and shall, within five days after the receipt of such statement, file his amendments with the Clerk; and after having had such filing entered and indorsed, shall, on the same day, serve the said amendments, with the statement, upon the opposite attorney, who shall, within five days thereafter, unless such amendments are agreed to, give written notice of settlement before the Judge or Referee, or the amendments shall be deemed to be accepted. The notice shall be for not less than two, nor more than five days. After settlement, the statement shall be immediately engrossed and filed by the moving party within ten days.

The following rule is in force in the Fourth Judicial District only:

Rule—Notice of motion for new trial acts, as stay of all proceedings or process for execution, except where there is a special order of Court.

RULE 29. *Order enlarging time for filing statement—how to be construed.*

When an order shall be made enlarging the time to file a statement on motion for new trial, the same shall be construed to allow the filing of affidavits on which to make such motion, and the adverse party shall have the same number of days to propose amendments as was allowed by such order to file such statement.

RULE 30. *Guardian ad litem, qualifications of.*

No person shall be appointed guardian *ad litem*, either upon the application of the infant, or otherwise, unless he be the general guardian of the infant, or an attorney or other officer of this Court, or is fully competent to understand and protect the rights of the infant, has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party; nor unless he be of sufficient pecuniary ability to answer to the infant for any damage which may be sustained for his negligence or misconduct in the defense of the suit.

RULE 31. *Guardian of infant defendant—guardian, duties of.*

Every attorney or officer of the Court shall act as guardian of an infant defendant, whenever appointed for that purpose by an order of the Court. He shall examine into the circumstances of the case so far as to enable him to make the proper defense, and shall be entitled to such compensation as the Court may deem reasonable.

RULE 32. *Bond of guardian ad litem—bonds, how given.*

No guardian *ad litem* shall receive any money, or property, or proceeds of sale of real estate, until he has given security by bond conditioned for the faithful discharge of the duties of his trust, in double the amount of such property or money, with two sureties, who shall justify as in other cases. Said bond shall be approved by the Judge and filed with the Clerk.

RULE 33. *Deposits of money in Court—disposition of moneys.*

All moneys brought into Court shall be paid to the Clerk of the Court unless the Court shall otherwise direct, and be deposited by said Clerk in his name of office with such depository as may be designated by law. The amount so received, the purpose for which it was paid into Court, together with the fact of the deposit as herein provided, shall be noted by the Clerk in register of actions in the particular cause in which it is received, and shall at all times be open to the inspection and examination of every attorney of the Court, or any other person interested in such moneys.

RULE 34. *Orders upon depositaries of clerk—how drawn.*

Orders on depositaries for the payment of money out of Court, shall be signed by the Clerk and countersigned by the Judge, made payable to the person entitled thereto, or his attorney, and shall specify in what particular suit, or on what account the money is paid out, and the time when the order authorizing such payment was made.

RULE 35. *Papers belonging to the files not to be withdrawn.*

No paper or record belonging to the files of the Court, shall be taken from the office and custody of the Clerk, except upon the special order of the Judge, and a receipt from the party obtaining it, specifying the paper on record.

RULE 36. *Counsel to furnish form of decree.*

The counsel obtaining any order, judgment, or decree, may be required by the Clerk to furnish the form of the same.

RULE 37. *Production of records in Recorder's office.*

No order will be made by the Court, or Judge thereof, for the production from the Recorder's office of this city and county, of any of the books or records there deposited, unless some special ground is shown to the satisfaction of the Court for the making of such order. This rule not to apply to books or records containing original or disputed signatures required in evidence, or when certified copies of the records required are not by law made legal evidence.

RULE 38. *Undertaking on attachment—amount of.*

The undertaking required, before issuing a writ of attachment, in any action, shall be of an amount equal to at least one-half of the amount claimed by the complaint, and it may be increased or diminished by the Court, upon proper notice and cause shown.

RULE 39. *Filing an order and affidavit of arrest.*

The Sheriff shall file with the Clerk, the affidavit and order on which any arrest is made, within ten days after the arrest.

RULE 40. *Cancellation of instruments by Clerk—duties of Clerk.*

In all cases in which a judgment is entered upon a written instrument, the Clerk shall, at the time of entering judgment, note over his official signature, across the face of the instrument, the fact of the entry of the judgment and its date, with the name of the Court, and return the instrument to the party in whose favor judgment is rendered.

RULE 41. *Affidavit of merits—what to contain.*

An affidavit of merits shall state that the party has fully and fairly stated the case in this action to ——— [stating his counsel], who resides at ——— [stating the place of residence of such counsel], and after such statement he is advised by his said counsel, and verily believes, that he has a good and substantial cause of action, or defense, on the merits; and no postponement or continuance of any action shall be had, unless the party applying for the same, his agent or attorney, shall present to the Court an affidavit of merits, unless the same be waived by the opposing party or his attorney.

RULE 42. *Writs of attachment, how issued—time of filing to be indorsed on affidavit and undertaking.*

The Clerk shall indorse upon every affidavit and undertaking filed to procure a writ of attachment, pursuant to section 121 of the Practice Act, the hour and minute of the day, such affidavit and undertaking is filed, and the writ shall be issued thereon according to such indorsement.

RULE 43. *Court Commissioner—what orders he may grant.*

All *ex parte* orders usually made in chambers shall be granted by the Court Commissioner, when within his jurisdiction, unless otherwise ordered by the Court or Judge; but the Court Commissioner shall not grant any order

aying proceedings or enlarging the time to do any act, beyond twenty days in addition to the time allowed by law.

RULE 44. *Instructions to juries.*

In cases tried by jury, any charge or instructions asked for by either party must be presented to the Court directly after the close of the evidence, and before any argument is made to the jury.

RULE 45. *Intervention—when to be verified; when affidavit required.*

A person claiming a right to intervene in an action, shall present to the Judge a petition or complaint setting forth the grounds on which the intervention rests; if the pleadings in the original action are verified, such petition or complaint shall also be verified, and if the pleadings are not verified, the same shall be accompanied by an affidavit of the person desiring to intervene, or some one acquainted with the facts, and competent to be a witness, that the matters set forth in the petition or complaint so presented are true, and that the intervention is sought to be made in good faith. After reading such petition or complaint, the Judge may order the same to be filed. The petition or complaint when so filed shall stand as the pleading of the intervening party, and the party on whom the same is served may answer or demur thereto within the time (after service) prescribed by law for answering an original complaint.

RULE 46. *Commission and interrogatories.*

The party desiring to issue a commission shall, within five days after the order allowing a commission, present the direct interrogatories desired to be propounded, to the Judge for settlement and allowance, and shall give notice of such presentation two days prior thereto, naming therein the day, hour, and place where the same will be so presented, and if the opposite party desires to have cross-interrogatories propounded, he shall prepare the same and notice the same, upon a notice of two days, for settlement, within five days after the direct interrogatories have been settled and allowed. If notice of the settlement of cross-interrogatories shall not be given, as aforesaid, the right to join in the commission shall be deemed waived.

AN ACT

CONCERNING DISTRICT COURT REPORTERS.

[Approved March 13, 1866.]

§ 1. The District Judge of each of the Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, Twelfth, Third and Fifteenth Judicial Districts, is hereby authorized to appoint a competent short hand reporter, who shall hold such office during the pleasure of the Judge making the appointment, and who shall at the request of either party or at the discretion of the Court, in a civil case, or in criminal cases triable in the District Court, on the order of the Court, take down in short hand all the testimony, the ruling of the Court, and the exceptions taken, and shall within five days, or such reasonable time after the trial of such case as the Court may designate, write out the same in plain, legible, long hand writing, verify and file it, together with the original short hand writing, with the Clerk of the Court in which the case was tried.

§ 2. Such report, written out in long hand writing as aforesaid, shall be deemed *prima facie* a correct statement of the evidence and proceedings therein contained.

§ 3. Such Reporter shall receive such compensation for his services as may be agreed upon between the said Reporter and the counsel in the cause; and in the case of failure to agree between the said parties, then the amount may be fixed by the Court; provided that when so fixed it shall not exceed ten dollars per day, and twenty cents per folio for transcription, which amount shall be paid by the party requiring the services of such Reporter, and be taxed up by the Clerk of the Court as costs against the party against whom judgment is rendered unless he shall have already paid such Reporter's fees; *provided*, that in criminal cases or capital offenses, when the testimony has been taken down by order of the Court, the compensation of the Reporter shall be fixed by the Court and paid out of the treasury of the county in which the case is tried, on the order of the Court; *provided*, further, that the Judge may in his discretion require the Reporter's fees to be paid or a sum equivalent thereto to be deposited with the Clerk of the Court, before any judgment or verdict shall be entered in the case or any further proceedings be had therein.

§ 4. An act entitled an act concerning District Court Reporters for the Fourth, Sixth, Seventh, Tenth, Twelfth, and Fifteenth Judicial Districts, approved May seventeenth, one thousand eight hundred and sixty-one, and the several acts amendatory thereto, and all acts and parts of acts, so far they conflict with the provisions of this act, are hereby repealed.

§ 5. This act shall take effect from and after its passage.

AMENDMENTS TO REPORTER'S ACT.

STATUTES 1867-8; p. 455.

Section three of said Act is hereby amended so as to read as follows:

SECTION 3. Such Reporter shall receive as compensation for his services not exceeding ten dollars per day for taking notes, and not exceeding twenty cents per folio for transcription, to be paid by the party in whose favor judgment is rendered, and be taxed up by the Clerk of the Court as costs against the party against whom judgment is rendered. In case where a transcript may be required by the Court, the expense thereof shall be paid equally by the respective parties to the action, or either of them, in the discretion of the Court; and no verdict or judgment shall be entered up, except the Court shall otherwise order, until the Reporter's fees shall be paid, or a sum equivalent thereto be deposited with the Clerk of the Court. In no case shall the transcript be paid for unless specially ordered by either plaintiff or defendant, or by the Court; nor shall the Reporter be required, in any civil case, to transcribe his notes until the compensation per folio therefor be tendered to him or deposited in the Court for that purpose. In criminal cases, or capital offenses, when the testimony has been taken down by the order of the Court, the compensation of the Reporter shall be fixed by the Court and paid out of the treasury of the county in which the case is tried, on the order of the Court.

REPORTERS IN COUNTY COURTS.

STATUTES 1867-8; p. 425.

SECTION 1. The Judges of the County Courts of San Francisco, Napa, Sonoma and Solano are hereby authorized, where they deem it necessary, to appoint a competent Phonographic Reporter to take the testimony in short hand in cases of felony that may arise in said Courts. Said Reporter shall take the testimony in civil cases only at the request of the parties to the suit. The notes of said Reporter shall always be taken as *prima facie* evidence of the testimony given upon any trial where such notes are taken. Said Reporter shall receive for his services such compensation as is allowed by law to the Reporters in the District Courts of this State, and such compensation shall be paid by the county where such service is performed, in criminal cases.

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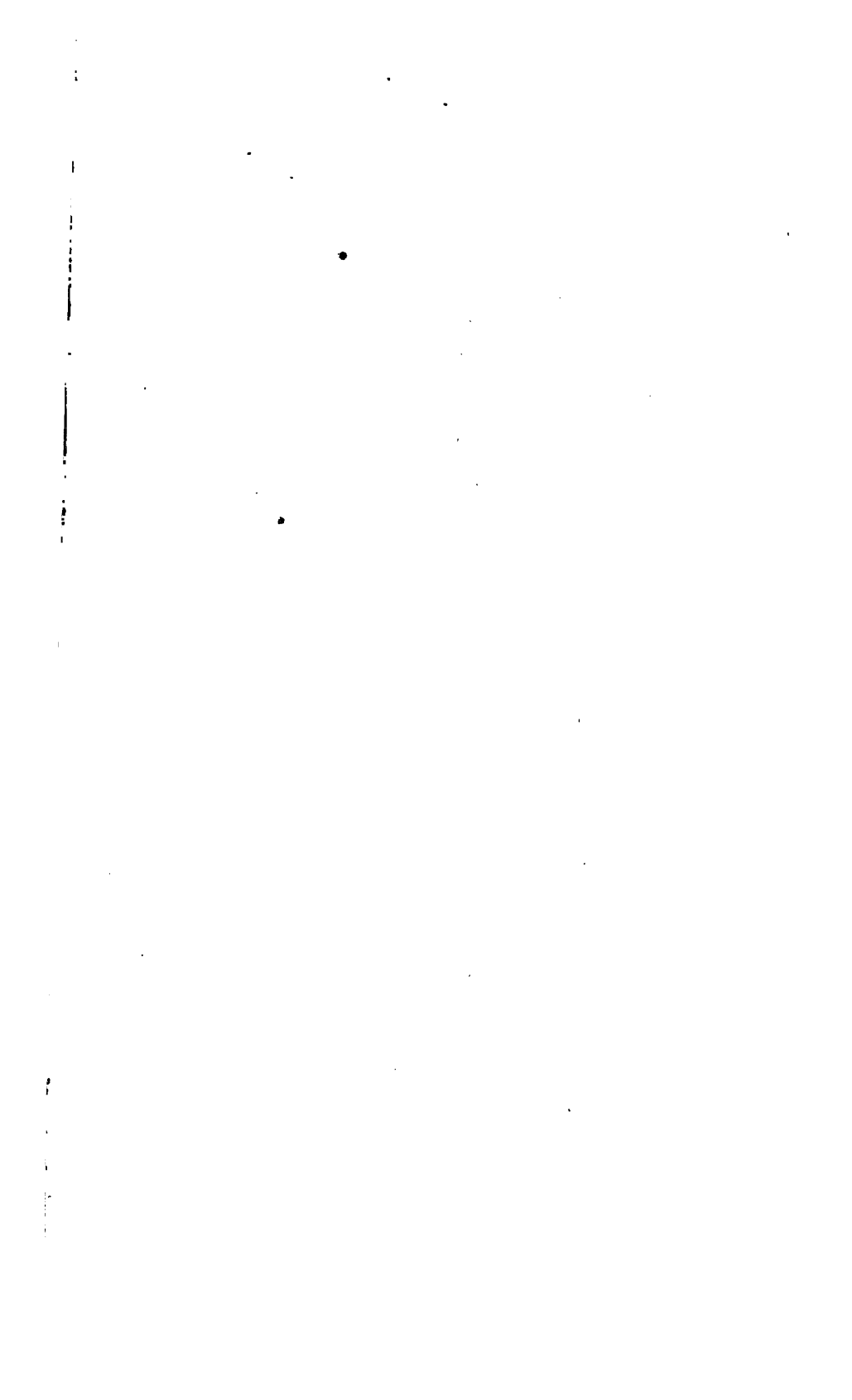
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- WRONGS**, but one action for the redress or prevention of private, 1.





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